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No. 02-1454

Supreme Court, U.S.
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In The

Supreme Court of the United States

SEMINOLE ENTERTAINMENT, INC.
d/b/a RACHEL'S,

Petitioner,

vs.

CITY OF CASSELBERRY,

Respondent.

On Petition For Writ Of Certiorari
To The Florida
Fifth District Court Of Appeal

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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RACHEL'S PRESENTED ITS CLAIMS TO THE FIFTH DISTRICT

In Section I of its brief in opposition, Casselberry argues that Rachel's claims were not addressed by the Florida Fifth District Court of Appeal and therefore this court should not exercise jurisdiction in this case. This argument is both legally and factually wrong. It is well understood that in reviewing state court decisions, this court will not consider a federal claim "unless it is either addressed by, or properly presented to, the state court that rendered the decision we [the United States Supreme Court] have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997). As this Court explained in *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969):

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefore be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." (footnotes omitted.)

Street, 394 U.S. at 584, 89 S.Ct. at 1361-62 *quoting New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928).

Both of the issues raised by Rachel's, due process/disqualification and prompt judicial review, were in fact presented to the Florida Fifth District Court of Appeal,

Reply App. A, App. 44-47, 61-72[1], and the trial court, Cert. App. G, App. 87-90, 106-119 in comprehensive fashion. The trial court addressed both issues on the merits. Cert. App. C, App. 22-24, 28-29. The Fifth District Court of Appeal expressly dealt with the issue of prompt judicial review concluding it did not support a reversal of the trial court. Cert. App. A, App. 4-5. Similarly, the remaining issues presented by Rachel's were summarily dismissed by the Fifth District Court of Appeal stating they did not support granting second tier certiorari relief. Cert. App. A, App. 5. The record is clear that these issues, while dealt with summarily, were in fact addressed by the Fifth District Court of Appeal. At a minimum, the issues were properly presented to that court with fair precision and in due time. *See* Reply App. A, App. 44-47, 61-72. Casselberry's argument that they are not adequately presented for review is simply incorrect.

The courts of this land are diametrically opposed concerning whether First Amendment cases which come under the so-called Adult Entertainment umbrella are entitled to prompt review on the merits or, alternatively, whether they should be treated like any other case – which means a simple filing suffices under *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). This case presents an opportunity to reconcile this longstanding conflict among the federal and state courts.

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[1] Rachel's cites to the Appendix in its Petition for Writ of Certiorari as Cert. App. A, App. ___. Cites to the Appendix of this Reply Brief shall be as Reply App. A, App. ___.

CASSELBERRY MISUNDERSTANDS THE NATURE OF RACHEL'S ARGUMENT. ABSENT THE GUARANTEE OF PROMPT JUDICIAL REVIEW, CASSELBERRY'S LAWS ARE UNCONSTITUTIONAL

Prompt judicial review on the merits is an absolute constitutional guarantee under Justice O'Connor's opinion in *FW/PBS*. Absent such a guarantee, the revocation order at issue is invalid and the underlying laws upon which it is based are likewise unconstitutionally infirm. *See* Cases cited in Rachel's petition at p. 11.

Furthermore, the evidence against Rachel's was anything but overwhelming. In fact, the Rachel's I court stated that arguably the key management was unaware of illegal activity occurring on the premises. *See* Rachel's I, Cert. App. B at 17. Respondeat superior or strict liability cannot form a constitutional basis upon which to close a business protected under the First Amendment. *See Chulchian v. City of Indianapolis*, 633 F.2d 27, 32 (7th Cir. 1980); *Millennium Restaurants Group, Inc. v. Dallas*, 191 F.Supp.2d 802 (N.D. TX 2002); *Millennium Restaurants Group, Inc. v. Dallas*, 181 F.Supp.2d 659, 665 (N.D. TX 2001); *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272, 297 (Col. 1995); *Lee v. City of Newport*, 1991 U.S. App. Lexis 26785; 1991 W.L. 227750 (6th Cir. 1991); *Pic n' Save Central Florida, Inc. v. Dept. of Business Regulation*, 601 So.2d 245 (Fla. 1st DCA 1992); *Freeze v. Dept. of Business Regulation*, 556 So.2d 1204 (Fla. 5th DCA 1990); *Bowling v. Dept. of Insurance*, 394 So.2d 165, 171-173 (Fla. 1st DCA 1981); *Woodbury v. State Beverage Dept.*, 219 So.2d 47 (Fla. 1st DCA 1969); *Taylor v. State*, 194 So.2d 321 (Fla. 2nd DCA 1967).

RACHEL'S IS ENTITLED TO HAVE THE REVOCATION ORDER LIFTED FROM ITS RECORD. FURTHER, CASSELBERRY HAS AMENDED ITS CODE ALLOWING THE INSTANT REVOCATION TO BE USED AS A PREDICATE FOR THE IMPOSITION OF ENHANCED PUNISHMENT IN THE FUTURE

Finally, Casselberry argues that this case is moot. This argument belies the fact that the revocation order, an administrative "conviction," remains on Rachel's record. This conviction, much like a criminal conviction carries collateral legal consequences rendering the case not moot. This court has long recognized that where a party suffers collateral legal consequences as a result of a conviction, the case is not rendered moot by the party completing his sentence. *See, e.g., Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

Casselberry conveniently ignores the fact that it amended its adult code (Sections 14-92 and 14-93) and may now use this prior revocation as grounds for the imposition of enhanced punishment against Rachel's in any future revocation proceedings. Reply App. B, App. 82-83. Furthermore, Casselberry's argument ignores the practical effects of the revocation on Rachel's business, i.e., significant financial impact that the revocation caused to the business. Given the clear collateral legal consequences of the suspension, a live case and controversy still exists.

Additionally, as Casselberry points out, Rachel's is again operating within the City and is still subject to the Adult Entertainment Code. It is clear that this case and the underlying events are capable of repetition yet would again evade review. Under such circumstances, this Court

has held that a case and controversy exists and the case is not moot. *See, e.g., Securities and Exchange Commission v. Sloan*, 436 U.S. 103, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978). Casselberry's argument to the contrary is without merit.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FIFTH DISTRICT

SEMINOLE ENTERTAINMENT, INC., d/b/a RACHEL'S

Petitioner,

v. **CASE NO.:**

CITY OF CASSELBERRY, FLORIDA,

Respondent.

SEMINOLE ENTERTAINMENT, INC.'S PETITION FOR WRIT OF CERTIORARI

TO: HONORABLE JUDGES
FIFTH DISTRICT COURT OF APPEAL
300 S. BEACH STREET
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The Petitioner, **SEMINOLE ENTERTAINMENT, INC.,** (hereinafter "Rachel's") through its undersigned legal counsel, respectfully petitions this Court pursuant to Fla.R.App.P. 9.100, to issue a Writ of Certiorari directed to the circuit court from its decision upholding the revocation of the petitioner's adult entertainment license.

I

BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction to issue a Writ of certiorari pursuant to Article V, Section 4(b)(3), Fla. Const. and Fla.R.App.P 9.030(b)(2) & (3). The lower court's decision departs from the essential requirements of law, acts to

deny Rachel's due process of law, and is constitutionally infirm. *Haines City Community Development v. Heggs,* 658 So.2d 523, 530 (Fla. 1995); *State, Dept. Highway Safety v. Porter,* ___ So.2d ___ (Fla. 2nd DCA 2001) [26 Fla.L. Weekly D1161].

II

RELIEF SOUGHT

The petitioner would request the following relief from the Court:

A. That the Court issue an order directed to the City of Casselberry to show cause why the petition should not be granted.

B. That the Court issue a final order/writ of certiorari vacating and reversing the lower court's order affirming Casselberry's revocation of Rachel's adult entertainment license.

III

APPENDIX DOCUMENTS

Pursuant to Rule 9.220, Fla.R.App.P., Rachel's is submitting its appendix with index under separate cover. Appendix documents will be referenced herein by **"App."** followed by the appropriate tab letter, e.g, **App. A, App. B, App. C,** etc.

IV

CIRCUIT COURT DECISION

In its order dated July 17, 2001, the circuit court denied Rachel's Petition for writ of Certiorari. The decision can be summarized as follows:

1. Disqualification Issue: The court found that even if the Casselberry City Commission was biased against Rachel's, Florida law prohibited the commission from disqualifying itself even when acting in a quasi-judicial (versus legislative) capacity. "Even if there were some personal bias or prejudice against the petitioner by the city commissioners, the rules do not allow the commissioner to abstain." **App. A** at p. 2.

2. Sufficiency of Charging Document: The court found that the city's notice of revocation complied with Florida law, that hearsay was properly admitted, and that Rachel's had an adequate opportunity to cross examine witnesses.

3. Knowledge Issue: The court found that the license could be revoked because Rachel's owners are responsible for the actions of those individuals left in control of the business. However, the court's decision does not contain a thorough analysis of the evidence or whether the applicable ("knowledge") legal standard was correctly applied by the city in revoking Rachel's license.

4. Unbridled Discretion: The Court found that Casselberry's adult code was not internally inconsistent and did not vest unbridled discretion with the commission because the city was not required to prove "knowledge" if it wished to **suspend** a business's license but was required to prove "knowledge" if it sought to **revoke** the license.

5. Clear and Convincing Proof: Despite the fact that Casselberry's adult code states that the burden of proof to revoke a license is preponderance of evidence, and despite the fact that the city commission made statements that it expected Rachel's to disprove the charges, the court found that the city commission's statements (made at the end of the revocation proceedings) that it would apply a clear and convincing evidence standard satisfied Florida law.

6. Prompt Judicial Review: Although this was a revocation proceeding rather than a denial of license proceeding, the court adopted the holding of the Eleventh Circuit in *Boss Capital v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999) and found that "prompt judicial review" was not a requirement in First Amendment cases.

The circuit court did not apply the correct law in this case, and its decision acts to deny Rachel's due process of law. Thus, for the reasons contained herein, the court's decision should be vacated and reversed.

V

STATEMENT OF THE FACTS

On November 10, 2000 the city of Casselberry served Rachel's with a notice of revocation of its adult entertainment license. The notice is extremely generic in nature and, rather than specifying the acts which formed the basis for the revocation, it simply regurgitates *stock* language from the city's adult entertainment code. For a copy of the code, see **App. B**, § 14-92(c) 3, 4, and 6. The notice reads in part:

1. The city manager has determined that the licensee or a person on its behalf or a person listed on the application pursuant to Section 14-80(b) of this article has knowingly[1] allowed possession, use, or sale of controlled substances on the premises of the establishment or business or when with a customer.

2. The city manager has determined that the licensee or a person on its behalf or a person listed on the application pursuant to section 14-80(b) of this article has knowingly allowed prostitution on the premises of the establishment or business or when with a customer.

3. Except in the case of an *adult motel*, the licensee or any person on its or his behalf or any person listed on the application pursuant to Section 14-80 of this article has knowingly allowed any specified sexual activities to occur on the premises of the establishment or business. See **App. C**.

The city amended its notice of revocation making some technical changes including changing the date that Rachel's had its license renewed from October 1, 1999 to October 1, 2000. See **App. C**. Rachel's filed a letter challenging the notice. See **App. E**.

---

[1] One of Rachel's challenges is that the city code allows an adult entertainment license to be revoked if a worker at the establishment "knowingly" allows certain criminal acts to occur – even though there is a lack of actual knowledge or, at a minimum, culpable negligence on the part of the licensee. The court will note in reviewing the application (**App. D**) that Rachel's ownership is required to list every worker at the establishment including entertainers. Under the verbiage used in the city code, if one of these dancers "knowingly" allows the commission of a criminal act, Rachel's license can be revoked. On this ground alone, the city code denies due process and constitutes an unlawful prior restraint.

Rather than appointing an independent hearing officer to hear the allegations against Rachel's, Casselberry's adult code provides for the city commission to preside over these quasi-judicial proceedings. Because of the political posture and tenor of these proceedings, as well as evidence of bias on the part of the Casselberry officials, Rachel's had a well-founded fear that it would not be treated fairly by the commission. As such, a sworn motion to disqualify the commission was filed. See **App. F**. Thereafter, Rachel's filed a supplement to its motion. See **App. G**.

As presented at the December 14, 2000 hearing, the evidence and sworn testimony supporting the motion revealed the following. In an *Orlando Sentinel* article which appeared on November 5, 2000, Casselberry's mayor made the following statements.

> However, **the strip bars with all their money, and corrupting influence**, continue to negatively impact our community. We should focus on improving our standards, . . .
>
> * * *
>
> My vision of Casselberry is a community that has redefined itself. By focusing on improving our neighborhoods, we can encourage citizen participation and involvement. This redefinition includes shedding our past image of being the adult entertainment capitol [sic] of central Florida.

See **App. H** (Emphasis added).

It should be remembered that the mayor was embroiled in a contested election prior to the initiation of revocation proceedings against Rachel's (November 7, 2000 election). During this election, the mayor ran on a

platform involving **"Strict enforcement of the illegal activities going on inside the strip bars."** See **App. I.** Obviously, the mayor's advertisement presupposed that illegal activities were occurring inside these so-called "strip bars."

Additionally, the following statements appeared in another advertisement/article that appeared on the mayor's campaign website.

> And, of course, there was the ongoing battle over adult entertainment. Clubs proliferated. All-night bars have become a draw. The city had developed a reputation as central Florida's hot spot for nude dancing. The city took it on the chin.
>
> * * *
>
> Elected officials have brought adult entertainment under control. strong leadership provides the framework for such a turn around. Casselberry mayor Bruce Pronovost has delivered that leadership.

See **App. I.**

Rachel's also tendered a transcript from an April 7, 1997 hearing showing the historical and political antagonism between Rachel's ownership and the mayor and city politicos. At that hearing, the mayor made the following statements.

> Well, I'll tell you who came to me originally. **It was a man by the name of Jim Veigle.** Jim Veigle was, I don't know what the correct legal term is, but he's certainly the controlling person over at Puzzles, also **the controlling person over at *Rachel's***, the adult entertainment. The question that was raised here tonight was also

very important with respect to adult entertainment, is community standards. It's obvious that if this ordinance was approved either by this city commission, or if put before the vote of the city of Casselberry, this would certainly lower the city of Casselberry's community standards. And what does that mean? What is [sic] our community standards mean/ Well I dare say that if our community standards are in fact lowered, then it will be open season in the city of Casselberry. **I have to also take a look and prior to this whole issue coming before us, our own police had an investigation. *In that investigation*[2] that started out at Puzzles and spilled over into Rachel's, there are arrests made and there are signed affidavits that talk about a number of different things. The proliferation of drugs. High level staff at the establishments getting involved. Talking about under-aged, forced under-aged drinking, talking about forced prostitution,** and the question I always have to keep coming back is how is this good public policy to establish a precedent and a monopoly for two former all-night clubs?

* * *

I've said it before, the strategy has been to confuse, to intimidate, to divide and to conquer. I'm not confused. I will not be intimidated. I do believe that the city of Casselberry will come

[2] This "investigation" was also a subject of discussion during the instant revocation proceedings. See page 28, infra.

together and not be divided, and the city of Casselberry will not be conquered.

See **App. J**. (Emphasis added).

In an August 17, 1998 deposition in the case of *State v. Wisenthal, et al.,* the mayor refused to answer whether he had made public statements regarding forced prostitution at Rachel's.

Q. Well, have you not made public statements that there's forced prostitution going on at Rachel's?

A. I don't recall.

See **App. K** at 16.

The mayor ultimately conceded that he had read reports regarding alleged criminal activity at Rachel's.

Q. Anyway, the affidavits that you reviewed, did the affidavits – the signed affidavits include allegations of under-aged drinking and forced prostitution?

A. I do recall some discussion about under-aged drinking and specifically that girls could not refuse drinks.

Q. Did you specifically see any information regarding forced prostitution.

A. I don't recall.

Q. How about any information regarding proliferation of drugs at *Rachel's* or any other establishment/

A. Yes.

App. K at 17. **See** also, pp. 29-32, infra (Emphasis added).

The mayor was also approached by Florida state legislator Bob Starks reference [sic] closing down the adult clubs in Casselberry.

A. Bob Starks is an elected official and I've talked to him on various issues.

Q. Has he ever asked about closing down the adult entertainment establishments in Casselberry/

A. Yes.

* * *

Q. What did he ask you about adult entertainment in Casselberry?

A. He's asked me what are we doing about, you know, the seediness of 17-92, something to that effect.

App. K at 30.

In its sworn motion, Rachel's also alleged that the city manager had discussions with the city commission about issues involving adult entertainment and criminal investigations involving Rachel's.

Q. Have you discussed adult entertainment issues with any of the commissioners individually?

A. I'm sure I have.

Q. Which commissioner?

A. Probably all of them.

App. L at 32. See motion to disqualify and discussion infra at pp. 28-32.

Per Casselberry's adult code, the city manager was the individual charged with the responsibility to prosecute Rachel's for the alleged revocation violations. Therefore, it is pertinent to note that the city manager's relationship with two of Rachel's principal owners had become so hostile that he no longer spoke with either one of them.

> Q. How would you describe your relationship with Jim and Charlie Veigle?
>
> A. I think it was fine until they leveled some allegations at me and I haven't really spoken with either one since that I know of, . . .

App. L at p. 39.

Similarly, it was alleged that in 1997 the city manager had "[v]erbally informed every member of the Casselberry City Commission that there was an investigation into illegal activities at Rachel's." See **App. E**. Support for this assertion is also found in the sworn deposition testimony of the city manager in *Time Traveler's Inc. v. City of Casselberry*. This issue was also discussed at the revocation hearing and is discussed herein, infra at pp. 28-32.

The sworn motion further provided that the city manager had "on one or more occasions advised and/or sought to influence one or more Casselberry city commissioners on the very matter [revocation of license] to be addressed in this proceeding". See **App. F**.

It was also asserted that commissioner David Henson (who also holds the post of vice-mayor) participated in an undercover investigation conducted by the police to collect evidence against one or more principals of Rachel's.

To further buttress its claim that Rachel's had a reasonable fear of bias, consider the following:

> Commissioner Henson has had a number of conversations with people regarding alleged drug use and prostitution at Rachel's. These conversations include Lieutenant Joey Mulson of the Casselberry Police Department. Commissioner Henson also spoke with the city manager and he overheard comments made by mayor Pronovost. Commissioner Henson has also testified that Mr. Larry Wilder has witnessed sex acts at Rachel's. Additionally, Commissioner Henson has testified that his wife had witnessed illegal drug use at Rachel's and that he passed this information on to the city manager with a request to "check it out". He also questioned the city manager as to whether "we" were monitoring alleged sexual activity in limousine owned by Rachel's. These statements by Commissioner Henson and other testimony by him occurred during a deposition on September 23, 1997 in a case styled *Time Travelers v. City of Casselberry*.

See **App. F**[3]

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[3] Later it was confirmed in an *Orlando Sentinel* article that Commissioner Henson wore a hidden microphone in an attempt to prosecute one of Seminole Entertainment, Inc.'s principal owners.

> One of the city commissioners who will rule whether to shut down Rachel's nightclub because of allegations of prostitution, drug use and money laundering once wore a hidden microphone in an attempt to catch the club's principal owner in a bribery attempt.
>
> Commissioner David Henson acknowledged Friday that he served as a confidential informant for the City, County Investigative Bureau – the vice squad in Seminole County – during the 1996 investigation.

A hearing on Rachel's motion to disqualify was held before the city commission on December 14, 2000. **App. M**. The commission denied the motion, with three of the commissioners denying that they were biased against Rachel's. See **App. M** at p. 38. However, interestingly enough, Commissioner Clark made a statement expressing disapproval that Rachel's was attempting to disqualify the commission. "[A]nd it perhaps should have been done much earlier, rather than being more concerned about disqualifying us." See **App. M** at p. 17. Despite the commissioners assertions that they could be fair, Rachel's request to question the commissioners regarding their knowledge of the case and potential bias was denied. See **App. M** at p. 21.

Rachel's moved to dismiss the charging document (the notice of revocation) because it merely referenced the code provisions that Rachel's allegedly violated – it did not provide any specifics that would allow Rachel's to properly defend and prepare itself for trial.

> In other words, we are here with a certain degree of history, but absolutely no idea what specific acts we're being charged with. This is not a proceeding where there is some sort of discovery that's permitted under the ordinance code of the city of Casselberry.
>
> In other words, we don't have an opportunity to take pretrial depositions and pursue other matters that can result in clarification.
>
> So here we are on the day of the hearing. **It's impossible to prepare**, because we don't know what we're defending against, other than some vague generalities.

> Somebody at sometime, somewhere, did something wrong, and one of our – somebody who can be deemed to be, the corporation, Seminole Entertainment, Incorporated, is to be held responsible for that. That's all we know. That's constitutionally just insufficient.

App. M at pp. 9-10 (Emphasis added).

The motion to dismiss was denied. See **App. M** at p. 19.

Prior to the hearing Rachel's expressed concern that it could not cross examine the city's documents and that the city manager refused to provide a witness list or disclose the evidence to be offered against Rachel's.

> Mr. Thomas[4]: I spoke on the telephone with Mr. Kahn.[5] This was not done in writing. And Mr. Kahn, I believe, would acknowledge and correct me, but the conversation is, essentially, "I'm not trying to be coy, but I intend to use some, perhaps, depositions perhaps some other transcripts." I believe he may have referenced some sort of other documentary evidence. Kahn, "but without meaning to be coy, **I'm not going to tell you who my witnesses are, because I don't have to. I don't have to list my documents for you.**"

App. M at pp. 48-49 (Emphasis added).

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[4] Mr. Thomas and Mr. Sheppard represented Rachel's at the hearing.

[5] Mr. Kahn was the attorney representing the city manager who prosecuted the case.

Rachel's motion to continue was denied. **App. M** at p. 51. In lieu thereof, the commission gave Rachel's one hour to review the initial documents prior to the commencement of the hearing. Various objections were levied against the exhibits including that much of them constituted hearsay and were not germane to the proceedings.

Testimony of Michael J. Laney/Revocation Hearing

Mr. Laney is employed with the Seminole County Sheriff's Office. He was the assigned case agent in the investigation involving Rachel's. Laney first went undercover in January, 2000, and the investigation lasted six months. **App. M** at p. 77. His testimony included an explanation of exhibit 8 – a 200+ page affidavit[6]. Counsel for Rachel's objected to Laney's testimony because he was merely providing legal conclusions that certain individuals (acting on behalf of the licensee) "knowingly" allowed specified sexual activities to occur on the premises. At this point the commission voted to allow the mayor to hear and rule upon any objections. Mayor Pronovost overruled Rachel's objections. **App. M** at p. 81.

Laney stated that he saw Julie Meyers dance for two unknown persons and state "that feels good." Later he saw her pull her undergarments back under her dress and show her vaginal area to Laney. **App. M** at p. 83. On February 4, 20000, Laney sated that a dancer simulated

[6] An overwhelming percentage of this affidavit has nothing to do with the Casselberry nightclub. Further, it contains numerous references to hearsay statements.

oral sex over a police officer's groin area. He also testified regarding oral sex between girls and a discussion of sex shows in a limousine. Rachel's objections that much of this information was hearsay were overruled by the mayor. **App. M** at p. 86.

While testifying regarding events that occurred in April 2000, Laney prefaced his testimony by stating "I was *not* present during this time," and that he would "[r]ead you the information that I received." **App. M** at p. 97 (Emphasis added). Rachel's objected that this hearsay evidence was inadmissible. The mayor overruled the objection. **App. M** at pp. 97-99.

The city prosecutor, Michael Kahn, continually questioned Laney whether he knew that workers "knowingly" allowed possession or sale of a [sic] controlled substances on the premises. Objections were raised that Kahn was asking for a legal conclusion and there was an insufficient predicate for Laney to give such an opinion. **App. M** at p. 103. The mayor summarily dispatched with the objections.

> Okay. That takes us now to the motion that we heard just prior to our break – the objection, I should I should say. And the objection was overruled. So I will ask Mr. Kahn to go ahead and continue.

App. M at p. 109.

Mr. Laney described drug transaction(s) that occurred at the nightclub, specifically the purchase of Ecstasy from Julie Myers[7].

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[7] Again, much of this tracks the affidavit which was admitted into evidence. For a discussion of this document, see page 37-42, infra.

At page 111 of the transcript, the city asked Laney about conversations involving another agent and individuals at the club. Again, the hearsay objection was overruled.

Mr. Thomas: May I object to the gratuitous hearsay comments?

* * *

Mr. Thomas: Again, just to make my hearsay objection.

* * *

Mayor Pronovost: We'll allow the testimony.

App. M age p. 112.

After the objection was overruled, Laney regurgitated the hearsay evidence contained in the affidavit referenced at paragraphs 162 and 171, **App. N**, discussed infra at pp. 37-42.

Clearly, Commissioner Henson was listening attentively and wanted to make certain that the city presented a good case to revoke the license. Vice-mayor Henson made a number of interesting comments as it pertains to the admission of a credit card receipt.

So let's make sure we get all our ducks in a row. I've seen a copy bandied about. It doesn't appear to be an original credit card receipt.

* * *

Let's make sure we understand what we're doing.

Mr. Kahn: I understand.

App. M at p. 119 (Emphasis added).

At that point, the hearing was adjourned. **App. M** at pp. 119-120.

December 27, 2000 Hearing – Continuation

On December 27, 2000 the hearing was reconvened and Laney's testimony resumed. Laney described an instance where he saw two females, Ms. Meyers and Ms. Lethig, engage in oral sex with one another. **App. O** at pp. 26-27. Again, Laney was asked to tell the commission what several individuals had told him, including Robert Rexroad and Frank Otero. When the hearsay objection was raised, the mayor asked for guidance from city attorney Donna McIntosh.

Mayor Pronovost:	Any direction, madam attorney?
Ms. McIntosh:	No. Other than it appears that he was – he didn't really tell us what he said he was just telling us. Of course, the conduct could be an admission against interest as a manager of this facility.

App. O at p. 30.

The mayor overruled Rachel's objection. **App. O** at p. 31.

Darin Terry and Robert Rexroad both identified themselves to Laney as the general manager of Rachel's. Laney also met Jim Mulrenin. Rachel's objected that all of this information was irrelevant and waived by the city because it took the affirmative step of renewing Rachel's

license in November, 2000 – *after* the alleged criminal episodes. The objection was overruled. **App. O** at p. 34. Hearsay after hearsay was admitted during these proceedings, and the objections were continually overruled. **App. O** at pp. 39-41.

To show how keenly Commissioner Henson was interested in the proceedings, he asked several questions of this witness.

> Henson: I don't want to assume anything. I want to make sure you're clear and I understand what you're talking about.

App. O at p. 48.

Cross Examination of Laney

On cross, it was shown that the testimony regarding illegal activity involving Jim Mulrenin did *not* occur in Casselberry. These allegations stem from an investigation of the Rachel's in *Orange County*.

> Q. Did you observe him engage in any of the activities about which you've been testifying relating to dope, prostitution or specified sexual activity?
>
> A. Not at that location.
>
> Q. So he has nothing to do with this particular case other than he happened to walk through the premises on one occasion?

(Objection omitted)

> Q. Well, what did he have to do with this investigation as it relates to Rachel's –

A. The – as far as Mr. Mulrenin is concerned?

Q. – Rachel's on 436.

A. – I had no contact with him. His involvement was at the south location.

Q. Which is not even in Seminole County?

A. That's correct.

App. O at pp. 49-50 (Emphasis added).[8]

Further, Laney never had any contact with the owners/board members of Seminole Entertainment, Inc. – Charles Veigle, James Veigle, Nancy Voegtlin or Robert Kelley. **App. O** at pp. 50-52. There were a total of six arrests for prostitution over the course and scope of the six month investigation. **App. O** at p. 53. When asked whether Laney had any information to show that the owners of Rachel's had any knowledge of these activities, Laney refused to answer the question.

That's going to be part of an ongoing investigation, and **I'm not going to answer that at this time.**

App. O at pp. 53-54 (Emphasis added).

Rachel's attorney moved for a continuance until the investigation was completed so that he could adequately confront the witness. The city attorney advised the mayor that the questions to Laney exceeded the scope of direct

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[8] The court will note when it reviews the 200+ page affidavit (**App. N**) which the city relied upon to revoke Rachel's license, that an overwhelming percentage of it does *not* involve the Casselberry Rachel's.

examination. Therefore, the mayor sustained the prosecutor's objection and permitted the witness not to answer the questions. **App. O** at pp. 54-56. Rachel's attorney, Mr. Sheppard, was distressed that the attorney for the city manager would make an objection and then the attorney for the city commission would come to his aid and advise the mayor to sustain it. Rachel's continued to object that there was no evidentiary exception for a so-called ongoing criminal investigation[9] which would allow a witness to refuse to answer questions. The mayor continued to sustain the city prosecutor's objections – limiting cross examination. **App. O** at pp. 57-60.

Laney also refused to answer questions when asked if any of the owners of Rachel's had knowledge of drug transactions occurring on the premises. **App. O** at pp. 60-61. Once again, the commission's attorney became an advocate for the prosecution, telling Laney he did not have to answer the question.

Mr. Sheppard: That isn't what he answered. Is your answer, none?

Ms. McIntosh: He's not giving you any, and that's the answer.

* * *

Ms. McIntosh: No. But what he's saying is that, he's not going to testify as to if there's any evidence.

App. O at pp. 61-62.

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[9] A review of Chapter 90 of the Florida Statutes reveals that no such evidentiary privilege exists in Florida law.

Again, Rachel's objections were overruled by the mayor.

When asked whether the owners had knowledge of specified sexual activity, Laney again refused to answer the question. Again, the mayor overruled the objection. **App. O** at pp. 62-63. No one higher in the chain of command over Otero told Laney that Otero was in fact the manager. **App. O** at p. 65. When asked whether Otero was assisting law enforcement, Laney again refused to answer asserting the so-called ongoing criminal investigation privilege – which does not exist in the Florida evidence code. **App. O** at p. 66. Rachel's request to require the witness to answer the question was overruled. The same question was posed and the same response was given regarding Ms. Rexroad. Again the mayor overruled the objection. **App. O** at pp. 67-68.

Mr. Sheppard: Well, I guess my motion to compel him to testify is denied.

Mayor Pronovost: Right.

App. O at p. 68.

The scenario continued to repeat itself with the witness refusing to answer questions. **App. O** at p. 69.

Q. And then I'd ask the same question about Jennifer Sue Lethig?

A. I refuse to answer that on the grounds of an ongoing investigation.

Mr. Sheppard: Same argument.

Mayor Pronovost: Same ruling.

App. O at pp. 69-70.

The theme repeated itself with Mr. Mulrenin. **App. O** at p. 73.

As for Julie Meyers, Laney could present no evidence that she was acting on behalf of anyone other than herself.

> Q. Do you have any evidence with respect to paragraph 377, that Julie Meyers was acting on behalf of anyone other than herself.
>
> A. No sir; I don't.

App. O at p. 74-75.

The city prosecutor raised an objection that the answer called for a legal conclusion. Counsel rephrased the question.

> Q. Do you have any evidence that she acted on behalf of anyone other than herself when she made the transaction?
>
> Mr. Kahn: Same objection.
>
> Mr. Sheppard: It's not what you opine. Just do you have any evidence?
>
> Mr. Kahn: Again, my objection is because the phraseology that it [sic] calls for a legal conclusion.
>
> Mayor Pronovost: Objection is sustained[10].

App. O at pp. 75-76.

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[10] Perhaps it is not surprising that the mayor would overrule Rachel's objections but would sustain objections raised by the city. Throughout the proceedings, Rachel's objections were routinely overruled. **App. O** at pp. 103, 124, 129, 135, 139 and 170.

The police never documented any involvement by the owners of Rachel's pertaining to the criminal allegations. **App. O** at pp. 78-79. Of greater importance, Laney conceded that to his knowledge no one above Otero and Terry knew that they took a tip involving prostitution.

> Q. To your knowledge, did any one in the chain of command above Otero and Terry know that they took a tip providing you, I guess with –
>
> A. Not to my knowledge.

App. O at p. 83.

At the end of Rachel's questioning, Commissioner Henson once again questioned the witness. **App. O** at pp. 87-88.

Testimony of Christine Gigicos

Ms. Gigicos is a police officer assigned to the Metropolitan Bureau of Investigation. She described sex acts which occurred between two female dancers. **App. O** at pp. 125-126. Ms. Gigicos also related an incident involving the purchase of drugs. **App. O** at p. 139. There was also a discussion with Mr. Otero reference [sic] prostitution and getting girls from Gigicos to engage in prostitution. Apparently, Ms. Gigicos was pretending to be the head of an escort service. **App. O** at p. 145.

Ms. Gigicos had no knowledge of any wrongdoing by James Veigle, Charlie Veigle, Robert Kelley or Nancy Voegtlin, and she had no idea if the owners knew about the credit card transactions dealing with drugs. **App. O** at pp. 217-218.

Gigicos did provide some interesting testimony regarding one of the managers, Janice Royce. On one occasion, Gigicos was informed by Darin Terry, a doorman employed by Rachel's, that he would be the "look-out" for Gigicos and her associates while they received a private performance in the VIP room at Rachel's. Mr. Terry was looking out for management, in particular Janice Royce, as well as other customers and bouncers. **App. O** at pp. 167-170, 201 and 215.

Gigicos testified that Janice Royce, the General Manager of Rachel's, terminated the employment of two day shift dancers upon finding out that the two had engaged in oral sex in the establishment. **App. O** at p. 177. Gigicos was also aware that Jim Mulrenin was fired by the owners. **App. O** at p. 184. Gigicos did not know that Jennifer Lethig was fired on March 9.

Otero apologized to Gigicos for not spending more time with her – he was unable to do so because Janice Royce was on duty. Ms. Royce was the manager over Otero. **App. O** at p. 189. Gigicos never witnessed any acts of prostitution or drug transactions occur in the presence of Janice Royce. Nor was Ms. Royce present during any "sex shows." **App. O** at p. 216.

Gigicos interpreted statements by Rachel's employees that Ms. Royce was a "dragon lady" and a "hard ass" to mean that Ms. Royce strictly enforced the rules as to what the employees could and could not do. **App. O** at pp. 216-217.

At the end of Gigicos's questioning, Commissioner Henson once again had to question the witness. **App. O** at p. 204-206. Clearly, Commissioner Henson was attempting to prejudice the proceedings and "convict" Rachel's.

> Henson: Eighteen visits, a majority – what I'm trying to get a sense of – of the number of violations and how obvious they were to you.

App. O at p. 206.

Commissioner Henson's questions continued. **App. O** at p. 208-210.

> Henson: So what you're saying, it's possible that for one event, for lack of a better term, there could be five violations or ten violations per one event.

App. O at p. 209.[11]

Commissioner Henson again questioned the witness regarding whether the manger [sic], Janice Royce, could see anything. **App. O** at p. 218-219.

Testimony of William Christensen

Mr. Christensen is employed as a police officer with the city of Casselberry. **App. O** at pp. 221-222. He witnessed two females, Melissa Zinkiewicz and Julie Meyers, have oral sex and digitally penetrate each other. **App. O** at p. 229. Ms. Meyers also attempted to unzip agent Laney's zipper during a private dance. Darin Terry offered to provide a condom to Laney if he wanted to have sex with Ms. Meyers. **App. O** at pp. 229-230. Christensen also testified about a discussion with Robert Rexroad involving

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[11] It is worth repeating that Commissioner Henson previously wore a "wire" in an attempt to have one or more of Rachel's owners arrested.

a drug transaction. **App. O** at p. 247. He also stated that Frank Otero used a flashlight to illuminate a straddle dance that Sherry Allen performed for agent McGriff. **App. O** at p. 244-245.

Although there was testimony that Rexroad or Otero had knowledge of these acts, the testimony also revealed that these incidents were not condoned by Rachel's ownership or management. For instance, Christensen stated that none of these acts occurred in the presence of Jim or Charles Veigle, Robert Kelley or Nancy Voegtlin. Further, in all of the incidents he described, someone was acting as a look-out – which reinforces the point that these events were not sanctioned by Rachel's.

> Q. And, in fact, in all of those instances someone was up there lookin' out for whomever, correct?
>
> A. I'd have to refresh myself, but I would say almost everyone. Yes.

App. O at p. 250.

The person they were watching for was Janice Royce, the manager.

> Q. And it was communicated to you that, in part, the person they were lookin' out for was Janice Royce, correct?
>
> A. I wouldn't say on every incident, but on several. Yes.
>
> Q. And there was an attempt to conceal from Ms. Royce what was occurring; would you agree to that? That was your observation?
>
> A. That's what we were told. Yes.

Q. Time and time again, correct?

A. I don't know if I'd say time and time again, but there were several times. Yes.

App. O at p. 250.

* * *

Q. Did that give you the impression that there were acts occurring that were contrary to what Miss Royce would allow?

A. Yes.

Q. And whenever on occasion when Janice Royce would come to the area where specified sexual acts were occurring, those acts would stop, wouldn't they?

A. I can only say on two incidences do I remember that. But, yes.

App. O at p. 251.

As he did with the other witnesses, at the end of Christensen's testimony, Vice-mayor Henson had questions. **App. O** at p. 255.

Commissioner Henson and the other commissioners were in a hurry to finalize the revocation hearing.

Henson: We're taking a lot more time than I anticipated.

App. O at p. 259.

* * *

Commissioner Sheppard: You know, there's another fact here we have to consider. ***Those we represent, the citizens are looking for us to***

resolve this thing with some sense of urgency. They don't want it drawn out.

App. O at p. 266. (Emphasis added).

* * *

Henson: I just don't want to drag this thing out to the next millennium.

App. O at p. 277.

December 28, 2000 Proceedings

On December 28, 2000, the city manager (the prosecutor under the code), Jack Schluckebier, testified. **App. P** at p. 288. He serves at the pleasure of the city commission. **App. P** at p. 318.

Schluckebier related that there had been undercover investigations by both the city and a special task force against Rachel's over the past nine years.[12] **App. P** at p. 290. He relayed that there was an investigation in the Summer of 1996, and there was a monitoring event in April 1998.[13] Schluckebier relayed that an attorney for Rachel's had requested audio recorded tapes involving the daily activity summary of officer Botechello (City of Casselberry) between the dates of May 16, 1996 and August 22, 1996. **App. P** at p. 297. Schluckebier had

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[12] This directly ties in to the city manager and the city commission's animus toward Rachel's ownership. See discussion, supra at pp. 6-10.

[13] None of this information was disclosed in advance of the hearing and, more specifically, none of it was contained within the charging document/notice of revocation – in either general or specific terms.

discussions with law enforcement regarding the status of the "ongoing investigation" both before and after the arrests at Rachel's on July 20, 2000.[14]

The city manager then discussed the transcript of a hearing held before Judge Kirkwood – an Orange County Judge, Florida Ninth Judicial Circuit. **App. P** at p. 301-303. Schluckebier was then provided a copy of Exhibit 9, the [Judge Kirkwood] transcript – even though it was not moved into evidence. **App. P** at pp. 304-305. In deciding to revoke Rachel's license, Schluckebier also relied upon a revocation notice from the Division of Alcoholic Beverages & Tobacco.[15] **App. P** at p. 306. The city manager believed that the evidence was sufficient to "[s]ecure convictions so in [his] mind, the threshold of the standard that I was using went beyond mere allegations."[16]

App. P at p. 307.

To further reinforce the illusory notion that Rachel's received due process, the city manager relayed that he provided a copy of Exhibit 9 (the transcript of the hearing held before Orange County Judge Kirkwood) to either Mayor Pronovost or Commissioner Henson – even though this exhibit was *never moved into evidence* and was not made part of the record for this court's review.

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[14] This is the same ongoing investigation that Rachel's was foreclosed from cross examining witnesses about.

[15] This document was likewise marked as an exhibit but was not contained in the record of the proceedings.

[16] As stated in the body of this paper, *no convictions* were obtained or tendered to the commission.

Q. And you don't have the recollection of which city commissioner you distributed what's been marked as exhibit 9, the transcript of the hearing of the State of Florida, Office of Attorney General, reference Rachel's Men's Club et al., dated August 2, 2000?

A. I would be able to narrow it down to, I'm certain it was either mayor Pronovost or Commissioner Henson, but I don't remember which one.

Q. But you feel it was one or the other?

A. Yes sir.

App. P at pp. 313-315.

Schluckebier could not remember whether he received this document from Mr. Kahn (the prosecutor) or from another source. **App. P** at pp. 316-317. He also had a discussion with the mayor regarding **newspaper articles** addressing what was "going on" at Rachel's. **App. P** at pp. 320-321. (Emphasis added).

A. Probably roughly in the same time as when he was reading in the newspaper that people were being arrested for illicit activities.

App. P at p. 321.

When Rachel's attempted to question the city manager regarding the mayor's views on Rachel's and adult entertainment as contained in his campaign materials, the mayor sustained the prosecutor's objection. **App. P** at pp. 331-333. Schluckebier also recalled statements in a transcript containing quotes by the mayor involving conversions he had with Seminole County's sheriff regarding

Rachel's. The mayor expressed concern and alarm about the arrests that occurred at Rachel's and other establishments. Further, the city manager briefed the mayor on the undercover investigation that Rachel's conducted by the police officials. **App. P** at pp. 339-340.

Schluckebier admitted that Commissioner Henson had questioned him in the past about whether there was "abundant illegal activity" at Rachel's. **App. P** at pp. 341-342. Schluckebier (previously) informed the Casselberry City Commission of the 1996 criminal investigation against Rachel's. **App. P** at pp. 344-345. Apparently this is the same investigation that he testified formed the basis (at least in part) for the revocation action against Rachel's. See **App. P** at pp. 290-295.

Schluckebier was aware that Commissioner Henson had participated in an undercover investigation to collect evidence in an attempt to prosecute one or more principals of Rachel's. Schluckebier knew this because Commissioner Henson told him so. **App. P** at p. 346.

> A. I knew that he had a discussion somewhere along the way with someone at the county level about – since he knew some of the people involved at Rachel's, and since he had in the past been actually in attendance at Rachel's, would he agree to have a conversation with the principals.

App. P at p. 345.

Henson also told Schluckebier about allegations regarding drug use and prostitution at Rachel's. **App. P** at pp. 346-347. When the city manager's attorney objected to the question, the mayor sustained the objection. **App. P** at p. 348. When asked whether Commissioner Henson had

made statements that his wife had witnessed illegal drug use at Rachel's, the mayor once again stepped in and sustained an objection, preventing disclosure. **App. P** at p. 348. A follow up question was asked whether Henson had asked that this information be passed on to the city manager and that he check it out. Once again, the mayor stepped in. "Objection is sustained." App. P at pp. 348-349. In summation, Schluckebier reaffirmed that he had had discussions with members of the city commission regarding (purported) illegal activities at Rachel's.

> Q. Have you had any discussions with any other members of the city commission with respect to illegal activities at Rachel's other than the mayor and vice-mayor?
>
> * * *
>
> A. I think I – I've already affirmed statements that you read today and I'm certainly aware of those.
>
> Q. Are you aware of any others?
>
> A. No, sir. **But I certainly might have had some.**

App. P at p. 358 (Emphasis added).

Testimony of Cleveland Peters

The investigation against Rachel's in Casselberry started in March, 2000. **App. P** at pp. 366-367. On two occasions, Peters used his credit card to get cash and then used the money to purchase drugs. The person involved in

this transaction was Robert Rexroad. **App. P** at p. 368. Through Rexroad, Peters purchased drugs from Carlos Sanchez.[17] **App. P** at pp. 369-370. He left Rachel's and finalized the drug buy at a location in *Orange County*. **App. P** at p. 370. Rexroad told Peters that he was the manager and the general manager. **App. P** at p. 371. There was one other drug buy that occurred on July 12, 2000 when he was able to obtain case with his credit card. **App. P** at p. 372. It was during this time that Rexroad said, "well, I don't – I don't actually sell the drugs." **App. P** at p. 371. Rexroad explained that Rachel's received ten percent for "running the credit cards". **App. P** at p. 378. Peters did not know what Rexroad meant by that.

On March 9, 2000, Peters was taken by limousine from the Casselberry Rachel's to the Orange County Rachel's. The girls had sex with each other in the back of the limousine during the trip. **App. P** at pp. 385-386. On April 27, 2000, two females, Julie Meyers and Melissa Zinkiewicz, had sex with one another upstairs at Rachel's. **App. P** at p. 386. On each occasion, Peters paid the girls. **App. P** at p. 387. The managers on duty were Bobby Rexroad and Frank Otero.

Peters was shown an easel and Commissioner Henson suggested that they just hand the laser point to him because "that might be helpful to him." **App. P** at p. 389. The easel/diagram shows that there are stairs leading up to the second floor at Rachel's. Peters described the area in [sic] following manner.

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[17] Mr. Sanchez is *not* employed by Rachel's. **App. P** at pp. 405-406.

A. Okay. It would be over in this dark location, in this area right in here. (Indicating). That was the one on the second floor, was over in that – they – they moved the chairs around.

App. P at p. 389.

Peters characterized Otero as a "low-level manager." **App. P** at p. 398. Darin Terry was also considered lower management. **App. P** at p. 398.

Peters then discussed manager Janice Royce and her reputation at the club.

Q. It appeared – the reputation was that she appeared to be an enforcer?

A. They just said she was hard. They didn't like her.

App. P at p. 400.

Manager Danny Beers had the same reputation.

Q. Well, you were told that he was a, "hard ass," were you not?

A. Shawn Smith said he didn't like him; that he was different.

App. P at p. 400.

Peters has never witnessed any illegal activity on the part of Rachel's owners. **App. P** at p. 402. Peters does not even know who the owners are. When Rachel's attorney asked Peters whether they had any other evidence to tie the company into the drug transactions, the mayor sustained the prosecutor's objection. **App. P** at p. 404. Rexroad is the only person that Peters was aware of that

had knowledge of the drug transactions at the Casselberry club.

> Q. That's it, as far as your investigation revealed?
>
> A. Yes, sir.

App. P at p. 405.

As for Carlos Sanchez, he is *not* employed by Rachel's. He has his own company. **App. P** at pp. 405-406.

At the conclusion of Peters' testimony, Commissioner Henson had a number of questions. **App. P** at pp. 408-413 and 416-418. After closing arguments, Commissioner Henson wanted to know if he could reserve the right to request additional evidence later after he had reviewed what was available. **App. P** at pp. 472-473.

January 9, 2001 Hearing/Commissioner Henson's Disqualification

On January 9, 2001 the city commission re-convened. At that time vice-mayor Henson stated that he was the one who had received a copy of the hearing transcript (which was not moved into evidence) which is identified as Exhibit 9 on the index. See **App. Q.** Henson explained that he had received this transcript *prior* to the initiation of the revocation proceedings. **App. R** at pp. 3-4. Although he disqualified himself, he continued to maintain that he could be impartial. **App. R** at p. 4.

It was also during this hearing that a number of disclosures were made by the city commission. Several letters were received by the commission. These letter [sic] reflect (in part) the following.

> Dear Commissioners: **It is my hope that the City of Casselberry will do there [sic] best to rid their city and out [sic] county of clubs such as Rachel's.** It is demeaning to women and insulting to Christian people.
>
> * * *
>
> As a private citizen of Seminole County I appreciate what you're doing to combat the adult industry.
>
> * * *
>
> We have been following as have many other residents of Seminole County, the on-going proceedings relating to the unsavory goings on at that club.
>
> * * *
>
> We feel that this club is a detriment to the city as well as to the county. The citizens of Casselberry and Seminole County are closely watching the commission to see what transpires regarding this issue.

App. S (Emphasis added).

Commissioner Sheppard was also approached by Reverend John Book in an attempt to encourage "[h]im to vote in a measure that would, I think, restrict adult entertainment." **App. R** at p. 12. Commissioner Sheppard thought that he was just saying "hello" to Mr. Book. "All I thought we were doing was saying hello." **App. R** at p. 12. However, Reverend Book obviously thought different.

> Mr. Book: I never say hello on a subject like this that I don't try to influence.

App. R at p. 12.

Hearing January 16, 2001/Deliberations

On January 16, 2001 the city commission began its deliberations. During this hearing, the commission stated that although the adult code provides that the revocation need only be proven by a preponderance of the evidence, it would change the standard to clear and convincing evidence. Despite this assertion, there was never any contemporaneous statement showing exactly what the commission meant by clear and convincing evidence or whether they understood the concept. It was equally clear that the city commission also felt that Rachel's should be "convicted" because, in the commission's "mind", Rachel's did not **disprove** the allegations against it. The following quotes from two of the city commissioners support this assertion.

> We had half of that, a case presented by the city manager, **but the licensee chose to rest their case without presenting any evidence to substantiate their defense** and simply chose to rely on raising doubts on the evidence or the witnesses or punch holes in the city manager's case.

App. T at p. 14.

* * *

> *Defense provided no evidence* that these were in fact rogue employees;...

App. T at p. 23.

* * *

> The sale and use of drugs, prostitution, and sexual activities on the premises were clearly evident and *not denied* by Mr. Sheppard, Rachel's attorney.

* * *

> In my opinion *nothing was presented* into evidence to prove the owners had no knowledge.

* * *

App. T at p. 9 (Emphasis added).

* * *

> I don't believe that enough evidence was provided to me *in support for Rachel's*, . . .

App. T at p. 11 (Emphasis added).

Summary of City's 200+ page affidavit

A central focus of the revocation proceedings was a 231-page affidavit for arrest warrants. See **App. N.** It is replete with irrelevant and multiple hearsay statements – all of which were not subject to cross examination by Rachel's.

Page 4 reflects that the Casselberry Police Department was conducting an investigation of Rachel's in 1996. This is the same investigation which the Casselberry City

Commission was previously made aware of and which supported (in part) Rachel's motion for disqualification. Pages 4 through 6 contain hearsay statements of Jason Rarick who did *not* testify at the hearing. Furthermore, Rachel's was not put on notice of any of this information since it was not referenced in the notice of revocation. An additional hearsay statement of Jay Lewis appears at page 7 of the affidavit. Statements from Julie Meyers and Jennifer Lethig are referenced at page 11. At page 32 the affidavit states that a manager identified as Janice Royce caught two day shift dancers engaging in oral sex upstairs and "threw the dancers out of the business".

Because this affidavit contains hearsay upon hearsay, Rachel's attorneys repeatedly objected to it. **App. R** at p. 439.

From pages 25 through 37 (**App. N**) there is a typed version of an audiotape (not subject to confrontation, review or moved in to [sic] evidence) which references statements between two individuals discussing sex and a limousine driver. However, none of these actions or discussions occurred at Rachel's.

Pages 37 through 42 discuss actions which occurred at **Rachel's South** in *Orange County*. At page 42 the affidavit references a discussion with an individual regarding a drug transaction – but again, none of this occurred at Rachel's. Page 43 the affidavit references a telephone discussion between a police agent and Julie Meyers – but again, none of this occurs at Rachel's.

At page 46 (**App. N**), Darin Terry references that it is not his job to make the dancers dance on boxes, it is really the manager's job. At page 49, paragraph 187, there is a hearsay statement from Frank Otero stating that there is

no upstairs at Rachel's South "[s]o that kinda eliminates that."[18]

Pages 49 through 52 involve incidents at **Rachel's South** in Orange County.

Page 52 states that two agents entered the business but there is no description of whether it is Seminole or Orange County. Page 54 et seq. involve activities and conversations which occurred at **Rachel's South**, *Orange County*. Page 57 references a hearsay statement from agent Cynthia Sherman which again references **Rachel's South**, not Casselberry. Page 59 references telephone conversations that did not occur at Rachel's.

Page 60 again references the Orange County Rachel's location – also known as **Rachel's South**. The discussions at page 61 focus upon the Orange County location. Page 61 through 68 reference **Rachel's South**-Orange County. Page 68 references activity that occurred in a limousine and not on the Rachel's premises. At paragraph 276 there is a reference that someone came into the upstairs area of Rachel's North and the dancers stopped their sexual activity. One of the dancers left and hid in the dancers' dressing room.

Pages 71 through 73 (**App. N**) reference incidents at **Rachel's South**. Page 73 references events that occurred in a limousine in Orange County, Florida. Pages 74 through 85, starting with paragraph 304, again discuss **Rachel's South** – none of which is pertinent to the revocation claims levied against the Casselberry Rachel's.

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[18] The implication is that these activities had to be done in secret.

Pages 88 through 103 reference the **Orange County Rachel's**. The bottom of page 99 the discussion focuses upon a limousine ride which does not involve Rachel's Casselberry. Pages 109 through 111 reference the **Orange County Rachel's**.

At page 111 Frank Otero made a statement that Janice Royce is the "overall person in charge." Paragraph 399 references that former manager Jim Mulrenin was fired.

Pages 112 through 117 reference **Rachel's South**, Orange County. Pages 117 through 120 reference events that occurred in a limousine – *not* at the Casselberry Rachel's. Pages 120 through 121 discuss telephone conversations. Pages 121 through 131 reference **Rachel's South**, Orange County. Pages 132 through 134 reference Orange County and a limousine ride. Pages 134 through 140 reference a telephone conversation. Pages 140 through 142 reference a telephone conversation between agents Peters and Bobby Rexroad of Rachel's South. Pages 143 through 171 reference **Rachel's South**, Orange County. Pages 171 through 193 reference Orange County, a limousine ride and telephone conversations – again, none of which is germane to the Casselberry proceedings.

Pages 197 through 201 (**App. N**) discuss a limousine ride where Carlos Sanchez (not an employee of Rachel's) arrived at the Radisson Hotel and entered a limousine with agents Peters and Sherman.

At page 204, paragraph 536, it is reported that two dancers stopped what they were doing when they were warned that "Janice Royce was in the area" . . . At page 204 there is a reference that "[I]t should be alright when Janice Royce leaves." Pages 207 through 208 reference a

telephone conversation to Darin Terry, apparently at his home. At page 210 there is another reference to Janice Royce being downstairs in the main stage area and, therefore, it was alright to continue with the activities.

At paragraph 569 there is another reference to the intolerance of Janice Royce to criminal activity.

> Darin Terry stated, "Sit down, because when you're standing there is guy over here with a girl and he's friends with her", meaning the subject was friends with Janice Royce.

Page 212 references a telephone call to Frank Otero's cellular telephone. At page 214 there is a reference to a telephone call made to Carlos Sanchez's cellular telephone. Page [sic] 214-215 references [sic] to **Rachel's South**. Pages 216 through 225 reference a conversation that occurred in Carlos Sanchez's limousine. Mr. Sanchez is *not* an employee of Rachel's. Page [sic] 225 to 226 references [sic] surveillance of Carlos Sanchez. Pages 226 through 227 reference **Rachel's Orange County**.

Considering the irrelevant, highly prejudicial and hearsay nature of this voluminous document, it never should have been admitted into evidence during the revocation proceedings. On this ground alone, the circuit court's decision should be reversed.

VI

LEGAL ARGUMENT

A. SEMINOLE ENTERTAINMENT WAS DENIED ITS RIGHT TO A NEUTRAL, UNBIASED AND DETACHED FACT FINDER

Throughout the proceedings below the city's position has remained consistent. The city has not challenged Rachel's position that the "facts" warranted disqualifying the city commission. Rather, the city insists that the city commission can **never** be disqualified in spite of evidence of bias or prejudice. Although rhetorical, what use is a hearing/trial if the fact finder (e.g., the city commission) is biased in favor of the prosecution (the city manager)? Under the city's analysis, *due process* is irrelevant to the legal equation. Considering the illogical underpinnings of this argument, it is both surprising and unfortunate that the circuit court accepted the city's position. As set forth below, both commonsense and the law undermine the circuit court's decision.

As reflected by the hearing transcripts and documents filed with this court, Rachel's adult entertainment license was suspended by the city commission after a **quasi-judicial hearing**. At the outset, one of the fatal flaws in this process was the city commission's determination to not only sit as the fact finder in this case, but further its pre-determination to revoke Rachel's license.

Prior to the hearing, Rachel's filed a sworn motion to disqualify which set forth numerous factual allegations. Rachel's further tendered a number of documents supporting its claims that the mayor and the city commission were biased against Rachel's. The factual statements and assertions raised by Rachel's were legally sufficient and

would place a reasonable person in fear of not receiving a fair hearing. Further, not only did the city commission ultimately deny the motion to disqualify, but it challenged the truth of the allegations by repeatedly asserting (in a self-effacing manner) that it would be fair and impartial.

In support of Rachel's position that it was denied its right to a neutral, unbiased and detached fact finder, see *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) [**impartial decision maker essential to due process**]; *Ward v. Monroeville*, 409 U.S. 57 (1972) [due process violated where mayor presided over traffic offenses and held responsibility for village's finances].

In *Jennings v. Dade County*, 589 So.2d 1337 (Fla. 3rd DCA 1991), the court held that due process was implicated based upon ex parte communications with the Dade County Commission while acting in a quasi-judicial capacity. Further, Judge Ferguson (in his concurrence) made the following instructive comments.

> Ex parte lobbying of an administrative body acting quasi-judicially denies the parties a fair, open and impartial hearing. (Citation omitted) Adherence to procedures which insure fairness "is essential not only to the legal validity of the administrative regulation, but also to the maintenance of public confidence in the value and soundness of this important governmental process." (Citation omitted) **The constitutional compulsions which led to the establishment of rules regarding the disqualification of judges apply with equal force to every tribunal exercising judicial or quasi-judicial functions.** 1 Am. Jur. 2d Administrative Law

> §64, at 860 (1962); *City of Tallahassee v. Florida Pub. Serv. Comm'n*, 441 So.2d 620 (Fla. 1983) (standard used in disqualifying agency head is **same standard used in disqualifying judge**), (remainder of citations omitted).

Jennings at 1345 (Emphasis added).

See also, e.g., Drogaris v. Martine's Inc., 118 So.2d 95, 96-97 (Fla. 1st DCA 1960) [quasi-judicial hearing must be fair, open and impartial, and compulsory attendance of witnesses is a component of due process]; *World Transportation, Inc. v. Central Florida Regional Transportation*, 641 So.2d 913 (Fla. 5th DCA 1994) [hearing officer disqualified based upon statements]; *Gates v. State*, 784 So.2d 1235 (Fla. 2nd DCA 2001) [inappropriate comments warrant disqualification]; *Cherry Communications, Inc. v. Deason*, 652 So.2d 803, 805 (Fla. 1995) [in license revocation proceedings an **impartial decision maker is a basic constituent of minimum due process**]; *Pelham v. School Board of Wakulla County*, 451 So.2d 1004 (Fla. 1st DCA 1984) [ordering members of the school board disqualified from participating in a hearing because Plaintiff showed a "**well-grounded fear that he will not receive a fair [hearing]** at the hands of the [respondent agency]"]; *National Labor Relations Board v. Phelps*, 136 F.2d 562 (5th Cir. 1943) [finding "a fair trial by an unbiased and non-partisan trier of facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in court by a judge," and that respondents had been denied a fair trial due to the impartiality of the examiner]; *R.C. Wall v. American Optometric Ass'n Inc.*, 379 F.Supp. 175 (N.D. Ga. 1974) [finding that bias of members of the board violated plaintiffs right to

obtain a fair hearing and the "role which the board must inevitably play in the process is sufficient to infect the process with substantial unfairness"]. See *Livingston v. State*, 441 So.2d 1083, 1085 (Fla. 1983) [when presented with a motion for disqualification, "if predicated on grounds with a modicum of reason, the judge against whom raised, should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned"]; *Franco v. State*, 777 So.2d 1138 (Fla. 4th DCA 2001) [court's comments manifesting dislike of attorney warranted disqualification]; *Coucher v. Licht*, 731 So.2d 835 (Fla. 5th DCA 1999) [writ of prohibition granted where judge had prejudged the credibility of witnesses]; *State ex rel. Allen v. Board of Public Instruction of Broward County*, 214 So.2d 7 (Fla. 1st DCA 1968) [ordering rule nisi in prohibition be made absolute due to bias and prejudice of school board members, thereby **prohibiting them from presiding over quasi-judicial proceedings** affecting livelihood of individuals]; *The Tower Group, Inc. v. Doral Enterprises*, 760 So.2d 256 (Fla. 3rd DCA 2000) [acrimonious judicial campaign involving re-election opponent]; *Cammarata v. Jones*, 763 So.2d 552 (Fla. 4th DCA 2000) [trial judge's suggestions warranted well-founded fear]; *Stockstill v. Stockstill*, 770 So.2d 191 (Fla. 5th DCA 2000) [trial judge's questioning of witness warranted removal]; *Royal Caribbean Cruises, Ltd. v. Jane Doe*, 767 So.2d 626 (Fla. 3rd DCA 2000) [judge's remarks suggested pre-existing unfavorable opinions warranted disqualification].

B. THE CITY CODE VESTS UNBRIDLED AND UNFETTERED DISCRETION WITH THE CITY COMMISSION

The Casselberry Code, specifically §§ 14-92 and 14-93, is an unconstitutional "prior restraint" in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, § 4 of the Florida Constitution because it vests overbroad discretion in the city commission to determine whether a license should be **suspended or revoked**. This discretion is further exacerbated due to the fact that the code, § 14-92, contains two subsections designated "c," one titled "Illegal activity/suspensions" and the other titled "Revocation." The first subsection "c" deals with the suspension of an adult entertainment license based upon three or more "violations" and "convictions." Under this subsection, criminal conduct resulting in a "conviction" can result in a suspension starting with thirty days, increasing to ninety days, and then to 180 days. In other words, if criminal conduct continues to occur and the owner of the establishment does not remedy same, the suspension time continues to increase – until ultimately the adult license can be revoked.

However, in this case, the city proceeded under the second subsection "c," styled "Revocation," paragraphs (3), (4) and (6), which allow the city to revoke an adult entertainment license absent a criminal conviction *or* an escalation in criminal activity. As such, this section is not only unduly vague and inconsistent, but vests unbridled discretion with the city to determine whether it will suspend a license based upon three or more criminal convictions or, in the alternative, to revoke a license without any evidence that a criminal conviction has been obtained, reviewed or adjudicated by the court.

Further, both subsections can be predicated upon the same (alleged) violations, e.g., Chapter 800, Florida Statutes [sexual offenses] or Chapter 895, Florida Statutes [illicit drug activity], etc. See § 14-92(a), City Code. However, once again, the operative distinction is that the city has the **unfettered discretion**, as it did in this case, to proceed under the latter subsection (c), paragraphs (3), (4), and (6), absent criminal conviction. As such, §§ 14-92 and 14-93 are unconstitutional and the circuit court should have found as much in applying well established law to the subject.

Any licensing scheme (predicated upon restricting free speech rights) which vests overbroad discretion in a government body is deemed an unconstitutional prior restraint. The underpinnings [sic] of this requirement (prohibiting overbroad discretion) is to prevent a government entity from denying a party its constitutional right to freedom of expression – without definite and fixed procedural safeguards. Here it is clear that the city is vested with unconstitutional discretion, as can be seen simply by reviewing the city code. As support for this assertion, Rachel's relies upon the following authorities. *Silver Spurs, Inc. v. Town of Palm Shores*, 1997 U.S. Dist. Lexis 23742 (M.D. Fla. 1997) [analysis employed in determining whether code constituted an unlawful **prior restraint in revoking license**]; *Diamond v. City of Taft*, 29 F.Supp. 2d 633, 648-650 (E.D. CA 1998), affirmed 215 F.3d 1052 (9th Cir. 2000); *Dease v. City of Anaheim*, 826 F.Supp. 336, 342-344 (C.D. CA 1993); *MJA Susu, Inc. v. County of Benton*, 853 F.Supp. 1147, 1151-1152 (D. MN 1994); *Lady Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1361-1362 (11th Cir. 1999); *University Books, Inc. v. Miami-Dade County*, 14 Fla.L.Weekly F. D178, D181-182

(S.D. Fla. 2001); *Nichols v. Village of Pelham Manor*, 974 F.Supp. 243 (S.D. NY 1997); *Franken Equities, L.L.C. v. City of Evanston*, 967 F.Supp. 1233 (D. Wy. 1997); *BJS No. 2, Inc. v. City of Troy*, 87 F.Supp.2d 800 (S.D. OH 1999); *Gayety Theaters, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Spokane Arcades, Inc. v. City of Spokane*, 1997 Wash. App. Lexis 1989 (Ct. App. Wash. 1997); *Cannabis Action Network v. City of Gainesville*, 907 F.Supp. 1508 (N.D. Fla. 1995); *Lee v. City of Newport*, 1991 U.S. App. Lexis 26785 (6th Cir. 1991); *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980).

C. NOTICE OF REVOCATION IS LEGALLY INSUFFICIENT

The city's boilerplate notice of revocation (purportedly informing Rachel's of the charges levied against it) is insufficient as a matter of Florida law. The generic-uninformative nature of this notice is obvious. See **App. C**.

The non-descript nature of this notice is illustrated by its reference to "adult bookstore." Obviously, Rachel's is not an adult bookstore. Because Casselberry's code does not provide for discovery, pretrial submissions of evidence, or subpoena power, the notice is of paramount and critical importance. This notice informed Rachel's of absolutely nothing. Rather, it reinforced the city's intent to engage in trial by ambush. Rachel's repeatedly challenged the notice and moved to dismiss it. Rachel's also requested pretrial disclosure of discovery, including a witness list. These requests were denied.

Because its license was revoked based upon acts which were not set forth in the notice of revocation, Rachel's was denied due process. The circuit court failed to

apply the correct law in upholding the revocation on this ground. *Lusskin v. State of Florida Agency for Health Care Administration*, 731 So.2d 67 (Fla. 4th DCA 1999); *Cottrill v. Department of Insurance*, 685 So.2d 1371 (Fla. 1st DCA 1996); *Delk v. Dept. of Professional Regulation*, 595 So.2d 966, 967 (Fla. 5th DCA 1992) [allegata and probata must correspond and agree]; *Hunter v. Dept. of Professional Regulation*, 458 So.2d 842, 844 (Fla. 2nd DCA 1984) [complaint seeking license revocation must state with specificity charged acts]. See also, *Klein v. Dept. of Bus. and Prof. Reg.*, 625 So.2d 1237, 1238 (Fla. 2nd DCA 1993) [doctor's due process rights violated when license was revoked based upon allegations of misconduct not contained in complaint]; *Chrysler v. Dept. of Prof. Reg.*, 627 So.2d 31, 34-35 (Fla. 1st DCA 1993) [due process violated where allegations not formally charged]; *Celaya v. Dept. of Prof. Reg.*, 560 So.2d 383 (Fla. 3rd DCA 1990) [due process entitles licensee to formal notification of charges]; *Burgess v. Storey County*, 992 P.2d 856 (Nev. 2000).

D. INADMISSIBLE AFFIDAVIT, HEARSAY INVALIDATED THE PROCEEDINGS

Limited amounts of hearsay are admissible in a quasi-judicial hearing but only if it is used to supplement and explain other admissible evidence. *Campbell v. Central Florida Zoological Society*, 432 So.2d 684, 685 (Fla. 5th DCA 1983); *State v. Porter*, 591 So.2d 1108, 1109 (Fla. 2nd DCA 1992); *Jones v. City of Hialeah*, 294 So.2d 686, 687-688 (Fla. 3rd DCA 1974) [question of admissibility of hearsay boils down to a question of fundamental fairness]. The 231-page affidavit which the city relied upon in revoking Rachel's license contains an inordinate amount of

inadmissible, irrelevant and highly prejudicial hearsay to which Rachel's repeatedly objected. **App. O** at pp. 231-235.

Because the city was so intent on admitting this affidavit and revoking Rachel's license, its attorneys took a shotgun approach in advancing legal theories to admit it. At first, the city prosecutor argued that this affidavit constituted a "public record." Later, the attorney for the commission urged the mayor to admit it as a record of a regularly conducted business activity – an exception to the hearsay rule. **App. P** at p. 441. Both theories constitute blatant distortions of the hearsay rule.[19] See 90.803(6) and (8), Florida Statutes; *Ellis v. State*, 622 So.2d 991, 996-997 (Fla. 1993) [pretrial statement to prosecutor from witness inadmissible]; *State v. Baird*, 572 So.2d 904 (Fla. 1990) [information provided to police officer inadmissible]; *Rae v. State*, 638 So.2d 597, 598 (Fla. 4th DCA 1994) [notations on ledgers made in anticipation of litigation not admissible as business record]; *Quinn v. State*, 662 So.2d 947, 953-954 (Fla. 5th DCA 1995) [entries inadmissible where it was unclear whether same was based upon personal observations or third party statements]; *Thomas v. State*, 581 So.2d 993, 995 (Fla. 2nd DCA 1991) [hearsay statement contained within report must likewise fall within a hearsay exception], overruled on other grounds, 666 So.2d 331 (Fla. 1995); *Visconti v. Hollywood Rental Serv.*, 580 So.2d 197, 198, n. 1 (Fla. 4th DCA 1991) (concurring opinion) [patient's statement was inadmissible because she did not

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[19] The record does not even establish that the city presented a proper witness or custodian to establish the prerequisites for admissibility. *Rae v. State*, 638 So.2d 598, n. 4 (Fla. 4th DCA 1994).

have a business duty to transmit same]; *State v. Inman*, 347 So.2d 791, 793 (Fla. 3rd DCA 1977) [report inadmissible as public record when based upon hearsay statements of witnesses].

Because this affidavit was inadmissible and tainted the proceedings, the circuit court erred in upholding the revocation. See *Visconti v. Hollywood Rental Serv.*, 580 So.2d 197, 198 (Fla. 4th DCA 1991) ["unquestionably, the appellants were prejudiced by the admission of such records"]; *Chrysler v. Dept. of Prof. Reg.*, 627 So.2d 31, 34-35 (Fla. 1st DCA 1993) [discussion of due process/ harmless error test in administrative proceedings].

E. RACHEL'S WAS DENIED ITS RIGHT TO CONFRONT AND SUBPOENA WITNESSES AND ITS RIGHT TO REMEDY

The city's police witnesses (repeatedly) refused to answer Rachel's questions asserting a so-called "continuing criminal investigation privilege." At the hearing, that was the basis for the witnesses's refusal to answer questions propounded by Rachel's attorney. However, the courts have repeatedly stated that cross examination must be liberally allowed so that a party may address any and all matters which can modify, clarify or shed light on a witness's testimony.

> Although the trial court has discretion in controlling the extent of cross examination, "cross-examination may go into any phase, and may not be restricted to mere parts . . . or to specific facts developed by the direct examination. *Dempsey v. Shell Oil Company*, 589 So.2d 373, 378 (Fla. 4th DCA 1991). Cross examination is not confined to the identical details testified to in

> chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief. . . . " *Dempsey*, 589 So.2d at 378 (citations omitted).

Young-Chin v. City of Homestead, 597 So.2d 879, 881-882 (Fla. 3rd DCA 1992).[20]

The failure to allow Rachel's to cross examine the city's witnesses is but another example of the denial of due process which infected these proceedings from the outset. Likewise, there are several cases which hold that when the government attempts to close a business, it must first give the business an opportunity to remedy the wrongs which form the basis for the government action. See *Healthclubs, Inc. v. State*, 338 So.2d 1324, 1327 (Fla. 4th DCA 1976); *City of Miami v. Keshbro*, 717 So.2d 601, 604 (Fla. 3rd DCA 1998). Although these cases arise in the context of nuisance abatement, the principle, purpose, and net effect of the proceedings are the same. In other words, the opportunity to remedy must be a prerequisite to revocation or closure.

Casselberry's code is also constitutionally flawed because it does not provide the licensee with the power to subpoena witnesses.

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[20] If the city is contending that its adult code prohibits such cross examination (in violation of the cited case authority), then same would be yet another violation of due process rendering the code and the revocation proceedings constitutionally flawed.

> It is so elementary that it requires neither citation nor elaboration that appellant, at his hearing before the Appeals Referee, as one of his minimal due process rights, had the right to subpoena witnesses to testify on his behalf.

Spiegel v. Lavis, 373 So.2d 72, 73 (Fla. 3rd DCA 1979); *Halpin v. Florida Unemployment Appeals Commission*, 516 So.2d 1027, 1029 (Fla. 1st DCA 1987) [referring to *Williams'* holding as constitutional right to compulsory process"]; *Williams v. Florida Dept. of Commerce*, 374 So.2d 1158 (Fla. 3rd DCA 1979) [basic right to compulsory attendance of witnesses]; *Dorgaris v. Martine's Inc.* 118 So.2d 95, 96-97 (Fla. 1st DCA 1960) [quasi-judicial hearing must be fair, open and impartial, and compulsory attendance of witnesses is component of due process].

F. THE CIRCUIT COURT DID NOT APPLY THE CORRECT LEGAL STANDARD IN DETERMINING WHETHER THE EVIDENCE SUPPORTED REVOCATION

Due process requires that the city prove that Rachel's had actual knowledge or, at a minimum, was culpably negligent in failing to prevent the alleged criminal activity from occurring at Rachel's. Record testimony reveals that these incidents were committed by a few rogue employees who concealed their actions from other personnel and managers at Rachel's and obviously to the exclusion of Seminole Entertainment, Inc. owners. These individuals used "look-outs" to make sure the wrong doing was not observed, and further made concerted efforts to insure that the manager, Janice Royce, did not witness same as she would not tolerate such activity.

Q. Darin Terry went on to say on, March 2, in your presence, quote, that the last – best time to be here is Sunday when the lady manager, Janice Royce, is not here just Frank, end quote. Is that what he told you?

A. That's correct.

Q. Now, how did you interpret that?

A. That they – from previous conversations with Darin Terry – that Janice Royce was a real hard quote, unquote, ass at the – at Rachel's. She ran upstairs VIP.

Page 183, December 27, 2000 transcript, **App. O**.

The testimony also revealed that no prostitution or drug activity occurred in front of Janice Royce. See pages 183-184, **App. O**.

Q. Can you testify that Janice Royce ever knew that such a show ever went on?

A. I believe she knew that it was going on. Yes.

Q. I understand you might believe that. But do you have any evidence to prove what you believe? Did you ever see her there when it was happening?

A. During the time the sex show was going on, no, sir.

Q. Now, the dancers referred to her as Dragon Lady –

A. Yes.

Q. – and Hard Ass?

A. Correct.

Q. And your understanding of what they were communicating in that regard was that she was strict about what they could and couldn't do?

(Objection omitted)

Q. Isn't that true, that that was your impression?

(Discussion omitted)

Q. Isn't it true that your interpretation of the reference to Janice Royce by the dancers that she was, quote, Dragon Lady, end quote, and Hard Ass, end quote, was that she strictly enforced some rules, prohibited some conduct?

A. That was probably part of the interpretation.

See page 216-217, December 27, 2000 Transcript, **App. O**.

Additional testimony from the police also indicated that these actions were not condoned nor did they occur with the knowledge of high-level management of Rachel's and certainly not to the knowledge of Seminole Entertainment's ownership.

Q. And, in fact, in all those instances someone was up there lookin' out for whomever, correct?

A. I'd have to refresh myself, but I would say almost every one. Yes.

Q. And it was communicated to you that, in part, the person that they were lookin' out for was Janice Royce, correct?

A. I wouldn't say on every incident, but on several. Yes.

Q. And there was an attempt to conceal from Ms. Royce what was occurring; would you agree to that? That was your observation?

A. That's what we were told. Yes.

Q. Time and time again, correct?

A. I don't know if I'd say time and time again, but there were several times. Yes.

See page 250, December 27, 2000 Transcript, **App. O.**

This testimony continued and established that manager Royce would not allow such acts to occur at Rachel's.

Q. Did that give you the impression that there were acts occurring that were contrary to what Ms. Royce would allow?

A. Yes.

Q. And whenever on occasion when Janice Royce would come to the area where specified sexual acts were occurring, those acts would stop, wouldn't they?

A. I can only say on two incidences do I remember that. But, yes.

See page 251, December 27, 2000 Transcript, **App. O.**

There is no competent evidence that any person committed any illegal acts while acting within the scope of authority of Seminole Entertainment, Inc. or in any responsible relationship with Seminole Entertainment. Any illegal acts committed on or about the premises of Rachel's were done by individuals not acting on behalf of

or for the benefit of Seminole Entertainment, Inc. No evidence was established that these purported violations occurred with Seminole Entertainment Inc.'s actual knowledge or that it was culpably negligent in failing to stop same.

Even in cases not involving freedom of expression rights (which are implicated here) the evidence in this case does not satisfy the requisite standard of knowledge in order to revoke Rachel's license. Thus, it should not stand. *Taylor v. State*, 194 So.2d 321 (Fla. 2nd DCA 1967) [discussion of knowledge and culpable conduct requirement]; *Woodbury v. State Beverage Department*, 219 So.2d 47 (Fla. 1st DCA 1969); *Bowling v. Department of Insurance*, 394 So.2d 165, 171-173 (Fla. 1st DCA 1981) [substantial evidence takes on vigorous implications in revocation of license proceeding; discussion of analysis employed in such proceedings]; *Freeze v. Department of Business Regulation*, 556 So.2d 1204 (Fla. 5th DCA 1990).

The circuit court's decision is flawed because it did not analyze or apply the correct standard of law in determining whether the revocation should stand. For this reason alone, the circuit court's opinion should be vacated.

G. THE CITY RELIED UPON THE WRONG (AND DE MINIMIS) STANDARD OF REVIEW, SPECIFICALLY PREPONDERANCE OF THE EVIDENCE. THE CITY IMPROPERLY AND UNLAWFULLY SHIFTED THE BURDEN OF PROOF TO RACHEL'S TO ESTABLISH THAT ITS ADULT ENTERTAINMENT LICENSE SHOULD NOT BE PERMANENTLY REVOKED

Even in administrative cases which do *not* involve constitutional rights protected under Article I, Section 4, the government entity is required to prove its allegations by clear and convincing evidence. *Chancellor Media Whiteco Outdoor v. Dept. of Transportation*, ___ So.2d ___ (Fla. 5th DCA 2001) [2001 Fla. App. Lexis 2353]. That is in direct contravention of the city's adult entertainment code which states that the burden of proof is preponderance of the evidence. See Section 14-93(b)(3), City Code. In this case the city initiated its revocation in reliance upon the preponderance standard, received and accepted testimony, and questioned witnesses. It was not until the deliberation stage of the proceedings that the city commission took an about face and gratuitously stated that it would in fact review the evidence based upon a clear and convincing standard of review. This constitutional infirmity is not cured by this political rhetoric. Further, there is nothing in the record to indicate that the city commission understood what the clear and convincing standard of review entailed – other than the revocation order prepared by its attorneys after the fact. As support for this point, Rachel's relies upon the following authorities. *Department of Banking and Finance v. Osborne Stern & Company*, 670 So.2d 932 (Fla. 1996); *Ferris v. Turlington*, 510 So.2d (Fla. 1987). Further, the city commission improperly shifted the

burden of proof to Rachel's to disprove the charges as reflected by the commissioner's comments during their deliberation.

H. THE CODE DOES NOT PROVIDE FOR PROMPT JUDICIAL REVIEW OR AN AUTOMATIC STAY

Casselberry's judicial review provision appears in § 14-93(d) of its adult entertainment code. Neither this provision or any other provision in Casselberry's Adult Code provides for an abatement or stay of the revocation order pending review and decision on the merits by the court. Under this provision, an aggrieved party must file a lawsuit in the Seminole County Circuit Court. Obviously, there are a few time constraints in ordinary civil actions. Unfortunately, some cases can take years to resolve. Casselberry's Adult Code reflects its belief that "prompt judicial review" is satisfied by providing prompt judicial "access." As explained below, mere access to the courts is not sufficient to satisfy the First Amendment and the United States Supreme Court's "prompt judicial review" requirement in prior restraint cases.

Any law that requires governmental approval, such as a license or permit, before one may engage in any form of "expression" that is constitutionally protected is called a "prior restraint." See *Near v. Minnesota*, 283 U.S. 697 (1931). The suspension/revocation scheme contained in Casselberry's Adult Entertainment Code is a shining

example of a prior restraint[21]. In Casselberry one must obtain an adult entertainment license prior to operating a business where exotic dancers perform. Dancing, even nude dancing, is a form of expression protected under the Federal and Florida Constitutions[22]. *Shad v. Mt. Ephraim*, 452 U.S. 61 (1981); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). Therefore, Casselberry's adult licensing scheme is unquestionably a "prior restraint."

Although prior restraints are not unconstitutional per se, the Supreme Court has repeatedly ruled that any system of prior restraints on expression "comes to this Court with a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963); *New York Times Co. v. United States*, 403 U.S. 372 (1963); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); and *Vance v. Universal Amusements Co.*, 445 U.S. 308, 315-16 (1980).

Because of the danger that protected expression might be suppressed, the Supreme Court has set out certain procedural safeguards that all legislative prior restraints

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[21] The revocation of an adult license, like the denial of an adult license, implicates the prior restraint doctrine. *Alexander v. United States*, 509 U.S. 544, 552 1993); *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir. 1999); *Spokane Arcade, Inc. v. City of Spokane*, 1998 Wash. App. Lexis 1237 (Ct. App. Wash. 1998); *Silver Spurs v. Town of Palm Shores*, 1997 U.S. Dist. Lexis 23742 (M.D. Fla. 1997).

[22] Pursuant to Casselberry's Adult Entertainment Code, Rachel's operates as an adult entertainment establishment offering striptease-erotic dancing for the enjoyment of its patrons.

must contain in order to pass constitutional muster. Beginning with *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965), and for twenty-five years thereafter, the Supreme Court has repeatedly ruled that any system of prior restraints must contain three procedural safeguards. **First**, any restraint imposed prior to a final judicial determination must be for a specified, brief period of time and must be limited to preserving the status quo. **Second**, prompt judicial review must be available. **Third**, the government must bear both the burden of seeking judicial review and the burden of proof. See, e.g., *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141 (1968); *Blount v. Rizzi*, 400 U.S. 410, 417 (1971); *United States v. Thirty-seven Photographs*, 402 U.S. 363, 367 (1971); and *Southeastern Promotions, Ltd. v. Conrad, supra* at 560. Thus, for twenty-five years after the *Freedman* decision there was no doubt concerning the requirements of laws such as §§ 14-92 and 14-93 of the city's code. Then came *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215 (1990).

FW/PBS was a plurality decision written by Justice O'Connor in which only Justice Kennedy joined. Part II of the opinion is the only part that dealt with the prior restraint doctrine, and therefore the only part relevant to this discussion. Five other justices concurred in Part II, three with reservations. The case involved a Dallas licensing scheme, similar to Casselberry's, which required adult-oriented businesses to obtain a license as a prerequisite to operating. Justices O'Connor, Kennedy and concurring Justice Stevens first suggested that one of the three *Freedman* requirements, i.e., the requirement that the government bear the burden of instituting judicial procedures and carry the burden of proof in court, be eliminated

(their reasoning is explained below). The court nonetheless found the Dallas ordinance unconstitutional because it lacked the two remaining *Freedman* safeguards, i.e., a specified brief period in which to grant or deny a license application and **prompt judicial review**. The court found these two safeguards to be "essential." Although the plurality failed to offer any enlightenment on the precise meaning of the term "prompt judicial review," Justice O'Connor mentioned the prompt judicial review requirement three times in her opinion. She referred to licensing laws that regulate protected expression as requiring "the possibility of," or "an avenue for," or "availability of" prompt judicial review. 493 U.S. at 228-30. Other than these three references, the plurality failed to further define or discuss what they meant by "prompt judicial review." In fact, the Supreme Court has never specifically defined the term, but as explained below, our highest court has always used "prompt judicial review" to mean a prompt judicial "decision."

During the ten years following *FW/PBS*, Justice O'Connor's language has created a split in the federal courts over the meaning of prompt judicial review. The First, Fifth and Eleventh Circuits have all interpreted *FW/PBS* to require that a statute provide only ***access*** to judicial review.[23] See *Jew for Jesus, Inc. v. MBTA*, 984

[23] A Seventh Circuit case, *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993), has also been cited to support the argument that mere "access" satisfies the prompt judicial review requirement, but it is not a proper citation. *Graff* was a plurality, *en banc* decision rendered by twelve sharply divided judges. Judge Manion and four others concluded that common law certiorari satisfied the prompt judicial review requirement, although "access" *vis à vis* "decision" was never discussed. The principal opinion was not a majority opinion of the court. The seven

(Continued on following page)

F.2d 1319 (1st Cir. 1993); *TK'S Video, Inc. v. Denton County, Tex.*, 24 F.3d 705 (5th Cir. 1994); and *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999). The Fourth, Sixth and Ninth Circuits have rejected any modification by *FW/PBS* of the traditional meaning of prompt judicial review and have maintained that a judicial ***decision*** is necessary to satisfy the requirement. See *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995); *Nightclubs, Inc. v. City of* Paducah, 202 F.3d 884 (6th Cir. 2000); *11126 Baltimore v. Prince George's County, MD*, 58 F.3d 988 (4th Cir. 1995); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998); and *4805 Convoy, Inc. v. San Diego*, 183 F.3d 1108 (9th Cir. 1999). The South Carolina Supreme Court has likewise aligned itself with those courts finding that prompt judicial review means a prompt decision – not access. *Harkins v. Greenville County*, 553 S.E. 2d 886 (S.C. 2000), U.S. cert. denied, 2000 Lexis 797.

The Florida Second District Court of Appeal, in analyzing Tampa's code, found that it did not deny prompt judicial review. However, the case did not involve the revocation of an adult entertainment license and the court found that the various constructions of *FW/PBS* did not have any application in that case. *P.M. Realty and Investments, Inc. v. City of Tampa, Florida*, 779 So.2d 404 (Fla. 2nd DCA 2000).

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judges who either concurred or dissented all indicated their disagreement with Judge Manion's conclusion that availability of judicial review satisfied the prompt judicial review requirement. Accordingly, the *Graff* decision may not be properly cited as holding that the prompt judicial review requirement is satisfied by judicial availability. But see, *McDonald v. City of Chicago*, 243 F.3d 1021 (7th Cir. 2001).

The specific issue which this court must decide is whether the "prompt judicial review" requirement in prior restraint cases is satisfied by prompt judicial "access" or whether a prompt judicial "decision" is required or, alternatively, whether an automatic stay of the license revocation satisfies this requirement. As noted above, the Casselberry Adult Entertainment Code provides for judicial access only.[24] Since Florida courts are not bound by any of the federal decisions cited above, other than decisions of the United States Supreme Court, this Court must look to its own good judgment and United States Supreme Court case law in rendering its decision. *State v. Dwyer*, 332 So.2d 333 (Fla. 1976); *Board of County Commissioners v. Dexterhouse,* 348 So.2d 916 (Fla. 2d DCA 1977); and *Martin v. Board of County Commissioners*, 364 So.2d 449 (Fla. 1978).

There are a number of compelling reasons why this court should rule that prompt judicial review is satisfied only by a prompt judicial decision and that at a minimum an automatic stay is required. **First**, in every prior restraint decision rendered by the United States Supreme Court between *Freedman v. Maryland, supra,* and *FW/PBS v. Dallas, supra*, (in other words, between 1965 and 1990), the Supreme Court has used the term "prompt judicial review" to mean a prompt judicial decision. See, e.g., *Teitel Film Corp. v. Cusack, supra* at 141 (striking a Chicago ordinance because it did not contain a provision assuring "a prompt judicial decision in the question of the

[24] The city purportedly attempts to require "prompt judicial review" but obviously it is not vested with the authority to require same. See § 14-93(d), Casselberry Code; Article V, Florida Constitution.

alleged obscenity of the film"); *Interstate Circuit v. City of Dallas*, 390 U.S. 676, 690, n. 22 (1968) ("the assurance of a 'prompt final judicial decision' is made here, we think, by the guarantee of a speedy determination by the trial court"); *Blount v. Rizzi, supra* at 417 (defining prompt judicial review as "a final determination on the merits within a specified, brief period"); *United States v. Thirty-seven Photographs, supra* at 367-70 (using the term "prompt judicial review" as synonymous with "a prompt judicial decision"); and *Southeastern Promotions, Ltd. v. Conrad,* 420 *supra* at 560 (in outlining the *Freedman* requirements, the court stated "a prompt final judicial determination must be assured," and holding that where a judicial decision was not obtained for more than five months, prompt judicial review was denied). Importantly, the Supreme Court has never so much as hinted that prompt judicial review means anything less than a prompt judicial decision.[25]

Second, there is just no way that Justice O'Connor's use in *FW/PBS* of the terms "the possibility of," or "an avenue for," or "availability of" prompt judicial review can be properly interpreted to relax the *Freedman* prompt judicial review requirement. There are at least four reasons why this is apparent:

(a) When Justice O'Connor refers to "prompt judicial review," she cites *Freedman*, and there can be no doubt that *Freedman* required that "[a]ny restraint imposed in

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[25] Recently the Supreme Court accepted certiorari on this issue but then determined that the issue was not ripe for review. *City News & Novelty, Inc. v. City of Waukesha*, 121 S.Ct. 743, 148 L.Ed.2d 757, 2001 U.S. Lexis 789 @ *14 (2001)

advance of a ***final judicial determination on the merits*** must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Freedman v. Maryland*, 380 U.S. at 59 (emphasis added).

(b) Furthermore, in writing that the one *Freedman* requirement should be eliminated, Justice O'Connor stated that the two remaining requirements, i.e., that an ordinance provide for an administrative decision within a specified brief time and prompt judicial review, were "essential." *FW/PBS*, 493 U.S. at 228.

(c) When she discusses the dangers that licensing schemes pose to protected speech, Justice O'Connor states that the failure of a licensing scheme "to provide for definite limitations on the time within which the licensor must issue the license" renders it invalid because it "contains the same vice as a statute delegating excessive administrative discretion." *Id.* at 226-27. Now why would she condemn a lack of time limitations imposed on a licensor to issue a license and condone a lack of time limitations imposed on a judicial reviewer to render a decision once a constitutional right (license to operate) has been revoked? A lack of time constraints in either case results in the suppression of protected expression. To require that an application be acted upon within a specified brief time and then place no time restrictions on judicial review simply makes no sense – especially when the situation is more grave, e.g., **license revocation**. What good is the one without the other? In fact, Justice O'Connor recognized that the time requirements for an administrative decision and judicial review are actually identical. This is apparent when she states that "[t]he core policy underlying *Freedman* is that the license for a First

Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech." *Id.* at 228. As the South Carolina Supreme Court ruled a few months ago, prompt judicial review must mean a prompt judicial decision, "[o]therwise, the prompt judicial review requirement loses all significance since the protection afforded by judicial review is meaningful only when it can be anticipated within a brief time period." *Harkins v. Greenville County*, 553 S.E. 2d 886 (S.C. 2000), U.S. cert. denied, 2000 Lexis 797.

(d) Finally, Justice O'Connor never gave any indication that she was altering the *Freedman* prompt judicial requirement. Surely she would have made some explicit reference to the fact that she intended to alter a twenty-five year old decision with the importance of *Freedman v. Maryland* – arguably the most important First Amendment decision in the Courts history. She certainly did not hesitate to announce the demise of the *Freedman* requirement that the government institute judicial proceedings and carry the burden of proof. It makes no sense that she would pussyfoot around with the prompt judicial review requirement. If she had intended to weaken the prompt judicial review requirement, she would have undoubtedly announced that fact without equivocation.

In sum, it is clear that Justice O'Connor was referring to a judicial "decision" within a specified, brief time when she used the term "prompt judicial review." To conclude otherwise is to ignore the obvious.

Third, it simply does not make sense that the United States Supreme Court would make prompt "access" to the courts a requirement in prior restraint situations when we

all have prompt access to the courts anyway (unless the Court feared that local governments might enact laws that deliberately and specifically deny prompt access to the courts). **Why would the Court make a requirement of something that already exists in the first place?**

Judge David R. Thompson of the Ninth Circuit Court of Appeals stated convincingly why providing mere "access" to the court is nonsensical. In *Baby Tam & Co., Inc. v. City of Las Vegas, supra*, Judge Thompson declared:

> We conclude that 'prompt judicial review' means the opportunity for a prompt hearing and a prompt decision by a judicial officer.
>
> The phrase 'judicial review' compels this conclusion. The phrase necessarily has two elements – (1) consideration of a dispute by a judicial officer, and (2) a decision. Without consideration, there is no review; without a decision, the most exhaustive review is worthless. In baseball terms it would be like throwing a pitch and not getting a call. **As legendary major league umpire Bill Klem once said to an inquisitive catcher: 'it ain't nothin' till I call it.' This is also true of judicial review. Until the judicial officer makes the call, it ain't nothing'**.

154 F.3d at 1101-02 (Emphasis added).

Perhaps Casselberry will argue that it has no authority to provide prompt judicial "access" to the courts, and that only the Florida Legislature and the Florida Supreme Court with its rule-making powers can do so. Such an argument is correct, but that does not justify the denial of constitutional rights. In *Graff v. City of Chicago*, 9 F.3d

1309 (7th Cir. 1993), three dissenting judges dealt with the same argument as follows:

> The majority posits the curious argument that Illinois law prevents municipalities from specifying what form of judicial review an administrative decision must receive. Perhaps. **But since when does a city gain special dispensation to violate the United States Constitution because a state law contradicts it? Under the Supremacy clause, the state law must give.**

(Emphasis added). The dissent in *Graff* also suggested that a municipality could petition the state legislature for a state-wide procedural rule that would provide prompt judicial access. The court in *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 894 (6th Cir. 2000), made the same suggestion.

In fact, some states have already accomplished what the cited opinions suggest. See J. David Guerrera, *Prompt Judicial Review*, 62 Brook. L. Rev. 1217 (1996).

The only effective means of avoiding the wrongful suppression of protected expression in the context of adult entertainment licensing schemes is to require a *statutorily imposed* judicial determination on the merits. The conclusion is inescapable.

However, this argument of whether the city has the power to enact such procedures is academic in some respects because the city has the power to grant an automatic stay (pending judicial review and decision) of its **license revocation**. In fact, Casselberry's Adult Entertainment Code provides for a stay pending the hearing process when the city commission determines the licensee's

fate. The problem is, the automatic stay is lifted and vacated once the adult entertainment license is revoked. As stated by a number of courts, at a minimum Casselberry must provide an automatic stay, otherwise its code is constitutionally infirm. *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir. 1999) [city's scheme for suspending and revoking license unconstitutional in that it did not provide for an automatic stay pending judicial review]; *Nightclub Management, Ltd. v. City of Canon Falls*, 95 F.Supp.2d 1027 (D. Minn. 2000) [although **automatic stay** went into effect pending city review of suspension/revocation, same was dissolved once city council rendered decision, thus law rendered unconstitutional]; *Spokane Arcade, Inc. v. City of Spokane*, 1998 Wash. App. Lexis 1237 (Ct. App. Wash. 1998) [until city enacts a mandatory stay, ordinance is unconstitutional in its entirety].

Because the circuit court applied the incorrect law in finding that prompt judicial review simply means prompt access, this Court should grant Rachel's petition for writ of certiorari and vacate the proceedings below.

CONCLUSION

For all the grounds aforestated, the Petitioner would ask that this Court issue a Writ of Certiorari vacating and reversing the Circuit Court's order dated July 17, 2001.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 3rd day of August, 2001, via U.S. Mail to **USHER L. BROWN, ESQUIRE,**

ANTHONY A. GARGANESE, ESQUIRE and **JEFFREY S. WEISS, ESQUIRE**, Brown, Ward, Salzman & Weiss, P.A., PO Box 2873, Orlando, FL 32802-2873; with the original being filed with the **HONORABLE FRANK HABERSHAW**, Clerk of Court, Fifth District Court of Appeal, 300 S. Beach Street, Daytona Beach, FL 32114.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is formatted in Times New Roman, 14 point type.

/s/ Steven G. Mason
STEVEN G. MASON
Florida Bar No. 842508
1643 Hillcrest Street
Orlando, Florida 32803
Telephone: (407) 895-6767
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APPENDIX B

This instrument prepared by:
Richard W. Wells, AICP,
Community Development Director
95 Triplet Lake Drive
Casselberry, FL 32707

ORDINANCE NO. 03-1079

AN ORDINANCE OF THE CITY OF CASSELBERRY, FLORIDA; AMENDING SUBSECTIONS (E) AND (F) OF SECTION 14-85, REASONS FOR DENIAL OF APPLICATION OF LICENSE, OF ARTICLE III, ADULT ENTERTAINMENT ESTABLISHMENTS OF CHAPTER 14, AMUSEMENTS, TO CONFORM TO AMENDMENTS TO REVOCATION PERIODS IN SECTION 14-92; AMENDING SECTION 14-92, SUSPENSION AND REVOCATION OF LICENSE, OF ARTICLE III, ADULT ENTERTAINMENT ESTABLISHMENTS, OF CHAPTER 14, AMUSEMENTS, TO CHANGE THE LETTERING OF PARAGRAPHS AND TO ADD ADDITIONAL REVOCATION PERIODS FOR SUBSEQUENT LICENSE REVOCATIONS; AMENDING SECTION 14-93, SUSPENSION AND REVOCATION PROCEEDINGS, OF ARTICLE III, ADULT ENTERTAINMENT ESTABLISHMENTS, OF CHAPTER 14, AMUSEMENTS, OF THE CODE OF ORDINANCES OF THE CITY OF CASSELBERRY, FLORIDA TO STATE THAT THE CITY COMMISSION SHALL REFER LICENSE SUSPENSION AND REVOCATION HEARINGS TO A HEARING OFFICER; PROVIDING FOR CODIFICATION, SEVERABILITY, CONFLICTS AND EFFECTIVE DATE.

WHEREAS, the City Commission of the City of Casselberry desires to correct a scrivener's error contained in Section 14-92, Suspension and revocation of license, of Article III, Adult Entertainment Establishments, of Chapter 14, Amusements, of the City Code by changing the lettering of paragraphs; and

WHEREAS, the City of Casselberry finds that compliance with City Codes is a substantial and compelling government interest; and

WHEREAS, the City Commission hereby finds that if an adult entertainment license is revoked two times, a four year revocation period should be imposed, and if an adult entertainment license is revoked three times, there should be a six year revocation period and desires to so amend Section 14-92 of Chapter 14, Amusements, to provide for these revocation periods and to conform Section 14-85 to reflect these amendments; and

WHEREAS, based on recent decision of the Florida Fifth District Court of Appeal in *Seminole Entertainment, Inc. v. City of Casselberry*, 811 So.2d 693 (Fla. 5th DCA 2001), the City Commission hereby finds that it may be beneficial and desirable for license suspensions or revocations under Section 14-93 of Article III, Adult Entertainment of Chapter 14, to be referred to a hearing officer to make findings of facts and conclusions of law, and the use of hearing officers would be in keeping with the practice of many municipalities and counties; and

WHEREAS, although the City Commission is of the opinion that this Ordinance is a general ordinance regulating conduct and is not an ordinance that affects the use of land as contemplated by Section 166.041(3)(c), Florida Statutes, the City Commission does not wish to become

sidetracked in lengthy and expensive litigation concerning procedural matters that are not relevant to the subject matter of this Ordinance and has, accordingly, determined to enact this Ordinance under the more conservative, expensive, and time consuming land use procedure as well as under the general procedure for ordinances that regulate conduct; and

WHEREAS, the City Commission has previously made numerous findings, and reviewed numerous studies, regarding the adverse secondary effects of adult entertainment establishments and sexually oriented businesses, all of which are hereby incorporated herein by this reference; and

WHEREAS, the City Commission hereby finds that this Ordinance is in the best interest of the public health, safety, and welfare; and

WHEREAS, words with double underlined type shall constitute additions to the original text and ~~strike through~~ shall constitute deletions to the original text.

NOW THEREFORE, be it enacted by the City Commission of the City of Casselberry, Florida, as follows:

SECTION 1. That Subsections (e) and (f) of Section 14-85, Reasons for denial of application of license, of Article III, Adult Entertainment Establishments, of Chapter 14, Amusements, of the Code of Ordinances of the City of Casselberry, Florida, is hereby amended to read as follows:

Sec. 14-85. Reasons for denial of application of license.

* * *

(e) The applicant or any of the individuals stated in Section 14-80 of this Article had a license under this Article which had been revoked within the preceding two years, if the license has only been revoked once; within the preceding four years, if the immediately preceding revocation was the second revocation; and within the preceding six years, if the immediately preceding revocation was the third revocation of the license under this Article.

(f) The applicant or any of the individuals stated in Section 14-80 of this Article is or was at the time of ~~suspension~~ revocation an officer, director or principal stockholder in any entity who had a license under this Article which had been revoked within the preceding two years, if the license has only been revoked once; within the preceding four years, if the immediately preceding revocation was the second revocation; and within the preceding six years, if the immediately preceding revocation was the third revocation of the license under this Article.

[remainder unchanged]

SECTION 2. That Section 14-92, Suspension and revocation of license, of Article III, Adult Entertainment Establishments, of Chapter 14, Amusements, of the Code of Ordinances of the City of Casselberry, Florida, is hereby amended to read as follows:

Sec. 14-92. Suspension and revocation of license.

The City Manager of designee shall suspend a license when he/she or designee determines that any one (1) of the following has occurred:

(a) For purposes of this Section 14-92, the term "violation" shall mean an incident having occurred at, or by, an adult entertainment establishment or sexually oriented business which is prohibited by the provisions of this Article or made unlawful by F.S. chs. 561, 562, 563, 564, 565, 794, 796, 800, 826, 827, 847, 893 or 895, or an analogous federal statute.

(b) Inspection of records and premises. In the event that the City Manager or his/her designee determines that the licensee or an operator at or of the licensee has refused to allow any inspection of records or premises as required by this Article; the City Manager or his/her designee may suspend the license for a period not to exceed 30 days.

(c) Illegal Activity/Suspension.

(1) In the event three or more violations occur within a two year period, and convictions result from at least three of the violations, the City Manager or his/her designee shall, upon the date of the third conviction, notify the licensee that the license shall be suspended for a period of 30 days unless good cause is shown in accordance with this Article, that the violations have not occurred. For purposes of calculating this two year period, the two year period shall be deemed to be those 24 months occurring immediately prior to

the violation occurrence date for which the 30 day suspension is sought.

(2) In the event one (1) or more violations occur within a two (2) year period from the date of the last violation occurrence date from which the conviction resulted in a thirty (30) day suspension pursuant to subsection (b)(1), but not including any time during which the license was effectively suspended, and a conviction results from one (1) or more of the violations, the City Manager or his/her designee shall, upon the date of the latest conviction, provide notice to the licensee that the license shall be suspended for a period of ninety (90) days unless good cause is shown in accordance with this Article that the violation has not occurred.

(3) In the event one (1) or more violations occur within a two (2) year period from the date of the last violation occurrence date from which the conviction resulted in a ninety (90) day suspension pursuant to subsection (b)(2), but not including any time during which the license was effectively suspended, and a conviction results from one (1) or more of the violations, the City Manager or his/her designee shall, upon the date of the latest conviction, provide notice to the licensee that the license shall be suspended for a period of One Hundred Eighty (180) days unless good cause is shown in accordance with this Article that the violation has not occurred.

(ed) Revocation. The City Manager or his/her designee shall revoke a license when he/she or designee determines that any one (1) of the following has occurred.

(1) There has been one (1) or more violations that have occurred within a two (2) year period from the date the last violation occurrence date from which the conviction resulted in a One Hundred Eighty (180) day suspension pursuant to (c)(3), but not including any time during which the license was effectively suspended, and a conviction results from one (1) or more of the violations, the City Manager or his/her designee shall, upon the date of the latest conviction, provide notice to the licensee that the license shall be revoked unless good cause is shown in accordance with this Part that the violation has not occurred.

(2) The licensee or any person on its or his/her behalf or any person listed on the application pursuant to Section 14-80(b) of this Article, gave false or misleading information in the material submitted during the application process.

(3) The licensee or any person on its or his/her behalf or any person listed on the application pursuant to Section 14-80(b) of this Article has knowingly allowed possession, use, or sale of controlled substances on the premises of the establishment or business or when with a customer.

(4) The licensee or any person on its or his/her behalf or any person listed on the application pursuant to Section 14-80(b) of this Article has knowingly allowed prostitution on the premises of the establishment or business or when with a customer.

(5) The licensee or any person on its or his/her behalf or any person listed on the application pursuant to Section 14-80(b) of this Article knowingly operated the adult entertainment establishment or sexually oriented business during a period when the licensee's license was suspended.

(6) Except in the case of an adult motel, the licensee or any person on its or his/her behalf or any person listed on the application pursuant to Section 14-80 of this Article has knowingly allowed any specified sexual activities to occur on the premises of the establishment or business.

~~(d)~~(e) Effective dates of suspensions and revocations.

(1) Except as otherwise provided in this Article, all periods of suspension and revocation shall become effective 15 days after the City Manager or his/her designee posts the notice of suspension or revocation at the licensee's establishment, or on the date that the licensee turns in his, her or its license, whichever happens first.

(2) The suspension or revocation shall be abated in the event that the licensee files a

timely challenge to the suspension or revocation in accordance with the procedures set forth in this article or upon order of a court of competent jurisdiction.

(3) If an adult entertainment establishment or sexually oriented business license is revoked for the first time, the licensee shall not be issued another adult entertainment establishment or sexually oriented business license for a period of two years running from the date the revocation actually takes effect after all abatement periods have lapsed.

(4) If an adult entertainment establishment or sexually oriented business license held by any of the entities or individuals listed in Section 14-80 is revoked for the second time and the license is held by any one or more of the entities or individuals holding the prior license, the licensee shall not be issued another adult entertainment establishment or sexually oriented business license for a period of four years running from the date the revocation actually takes effect after all abatement periods have lapsed.

(5) If an adult entertainment establishment or sexually oriented business license held by any of the entities or individuals listed in Section 14-80 is revoked for a third time and the license is held by any one or more of the entities or individuals holding the prior license, the licensee shall not be issued another adult entertainment establishment or sexually oriented business license for a period of six years running from

the date the revocation actually takes effect after all abatement periods have lapsed.

~~(e)~~(f) Other remedies. Notwithstanding the provisions of this Section, the City may pursue any and all other available remedies through any and all other available processes and procedures available to correct violations of City codes. Included within such remedies are the enforcement actions set forth in this Article, actions in a court of competent jurisdiction for injunctive or other appropriate relief, criminal prosecution, code enforcement proceedings, the issuance of citations, the suspension or revocation of permits relating to health or safety matters, and any and all other remedies available under the laws of the State of Florida and the United States.

SECTION 3. That Section 14-93, Suspension and revocation proceedings, of Article III, Adult Entertainment Establishments, of Chapter 14, Amusements, of the Code of Ordinances of the City of Casselberry, Florida, is hereby amended to read as follows:

Sec. 14-93. Suspension and revocation proceedings.

(a) Challenge to suspension or revocation. If the City Manager or his/her designee notifies a licensee in writing of the pending suspension or revocation of a license as provided in Section 14-92 of this Article, then the suspension or revocation shall become final and effective fifteen (15) days after mailing to the licensee's record address, posting at the licensed establishment, or actual delivery of the notice to the licensee, unless the licensee first files with the City Manager or his/her designee a written response stating the reasons why the suspension or revocation

is alleged to be in error or inappropriate and a written notice of intent to challenge the suspension or revocation requesting a hearing to determine whether the suspension or revocation will become effective. The suspension or revocation shall be abated in the event that a licensee files a timely challenge to the suspension or revocation in accordance with the procedures of this Article or upon an order of a court of competent jurisdiction. A suspension or revocation already in effect, but not previously challenged in a suspension or revocation hearing, may be challenged in the same manner but is not abated during the proceedings.

(b) Hearing on suspension or revocation. When a licensee files a written response and notice of intent to challenge a pending or existing suspension or revocation then a public hearing to determine if the pending suspension or revocation will become effective and final shall be held by ~~the City Commission~~ a hearing officer appointed by the City Commission.

The City Manager or his/her designee shall notify the City Attorney and any appropriate City offices who shall schedule and provide notice of the hearing date and time.

(1) Appointment, term and compensation of hearing officer:

(A) Three (3) hearing officers shall be appointed by the City Commission, and they shall be attorneys duly licensed to practice law in the State of Florida, who have practiced in the State for at least 5 years.

(B) Hearing officers shall be subject to removal with or without cause by the City Commission. Hearing officers shall not be considered to be City employees although they may receive compensation for their services and also may be reimbursed for such travel, mileage and per diem expenses as may be authorized.

(C) Because only attorneys may hold the position of hearing officer, the City Commission shall not be required to retain an attorney to represent the hearing officer.

(D) It shall be unlawful for a hearing officer to act as an agent or an attorney for a party involved in a determination under the provisions of this section or to be otherwise involved with any matter arising under this section which will come before the City during the term of the hearing officer's appointment. Further, a hearing officer shall not initiate or consider ex parte communications or other communications with any party of interest to a hearing officer concerning the substance of any proceeding to be heard by a hearing officer. However, the foregoing does not prohibit discussions between the hearing officer and City staff that pertain solely to scheduling and other administrative matters unrelated to the merits of the application. If a person engages in an ex parte communication with the hearing officer, the hearing officer shall place on the record

of the pending case all ex parte written communications received all written responses to such communications, a memorandum stating the substance of all oral communications received, and all oral responses made, and shall advise all parties that such matters have been placed on the record. Any party desiring to rebut the ex parte communication shall be entitled to do so but only if such party requests the opportunity for rebuttal within ten (10) days after notice of such communication, if he or she deems it necessary due to the effect of an ex parte communication received by him, the hearing officer may withdraw from the case and the City Commission shall appoint another hearing officer to handle the case.

(E) Selection of Hearing Officer. The City Manager and licensee shall each have the right to eliminate one (1) of the three (3) hearing officers selected by the City Commission. The one (1) hearing officer not eliminated by either party shall act as the hearing officer for the license revocation hearing. In the event licensee objects to all three (3) hearing officers, then the City Commission shall choose the hearing officer from the list of three (3) hearing officers absent a showing of clear prejudice by the licensee.

(2) The hearing officer shall have the power to:

(A) Adopt rules for the conduct of the hearing;

(B) Subpoena licensees and witnesses to its hearings. Subpoenas may be served by the Casselberry Police Department and/or other law enforcement agencies with jurisdiction to serve subpoenas;

(C) Subpoena evidence to its hearings;

(D) Administer oaths and take testimony under oath; and

(E) Issue an order having the force of law suspending or revoking the license.

(~~1~~)(3) The suspension or revocation hearing shall be held within thirty (30) days of the City Manager's receipt of a written challenge and request for a hearing by the aggrieved licensee.

(~~2~~)(4) The participants before the ~~City Commission~~/hearing officer shall be the licensee, any witnesses of the licensee, the City Manager or his/her designee and any witnesses of the City Manager or his/her designee. All witnesses shall provide their legal name, mailing addresses and telephone number.

(~~3~~)(5) The procedures used shall be those typically used in a civil case with The City Manager or his/her designee having the

burden of proof by preponderance of the evidence.

~~(4)~~(6) Testimony and evidence may be submitted by any witness but shall be limited to matters directly relating to the grounds for suspension or revocation. Irrelevant, immaterial, or unduly repetitious testimony or evidence shall be excluded.

~~(5)~~(7) All testimony shall be under oath. The ~~City Commission~~/hearing officer shall decide all questions of procedure and standing. All hearings shall be open to the public. Minutes shall be kept at all hearings. Unless otherwise mutually agreed to between the licensee and the City Manager or his/her designee, the order of presentation of testimony and evidence shall be as follows:

(A) The City Manager or designee and any witnesses of the City Manager or his/her designee.

(B) The licensee and any witnesses of the licensee.

(C) Rebuttal witnesses from the City Manager or his/her designee.

(D) Rebuttal witnesses from the licensee.

(E) Summation by the City Manager or his/her designee.

(F) Summation by the licensee.

~~(6)~~(8) The ~~City Commission~~/hearing officer may also call and question witnesses or request additional evidence as the ~~City~~

~~Commission~~/hearing officer deems necessary and appropriate.

~~(7) To the maximum extent practicable, the hearing shall be informal. Reasonable cross-examination of witnesses shall be permitted, but questioning shall be confined as closely as possible to the scope of direct testimony.~~

(9) The City shall provide a hearing room and clerical staff as may be reasonably required by the hearing officer to conduct hearings and perform his or her duties.

(10) Each party to the hearing shall have the right to call and examine witnesses, introduce exhibits, cross-examine opposing witnesses, impeach witnesses and rebut evidence.

(11) The licensee has the right at his or her own expense, to be represented by an attorney at any hearing.

(12) All testimony before the hearing officer shall be under oath and shall be recorded. The licensee or the City may cause a verbatim record of the proceedings to be made.

~~(8)~~(13) If the ~~City Commission~~/hearing officer comes to believe that any facts, claims,. or allegations necessitate additional review or response by either the licensee or the City Manager or his/her designee, then the ~~City Commission~~/hearing officer may order the hearing continued until an announced date certain, not to exceed thirty (30) days from the date of continuance. The

~~City Commission~~/hearing officer shall render a final decision on the appeal within sixty (60) days of the City Manager's receipt of licensee's written notice of challenge.

(14) Hearing officers may allow the parties to submit written proposed findings of fact and conclusions of law following the hearing and shall advise the parties of the timetable for so doing, if allowed.

~~(9) The City Commission shall render a written decision determining whether the suspension or revocation will become or remain effective at the conclusion of the hearing at which the appeal is decided or as soon as practicable thereafter.~~

(15) At the conclusion of the hearing, the hearing officer shall issue an order setting forth findings of fact, based on evidence of record, and issue conclusions of law regarding whether the suspension or revocation will become or remain effective, and shall render relief in the order affording the proper relief consistent with powers granted in this Section.

(c) Filing of decision. The original of the written decision of the ~~City Commission~~/hearing officer shall be filed with the City Clerk and copies shall be delivered or mailed to the licensee, the City Manager or his/her designee and the City Police Department.

(d) Judicial Review. Any person who participated in a suspension or revocation hearing before the ~~City Commission~~/hearing officer and who is aggrieved by the decision of the ~~City Commission~~/hearing officer may immediately

challenge the decision in any court of competent jurisdiction pursuant to the Rules of Procedure of that court. The record of the hearing shall consist of the complete record of the proceedings before the ~~City Commission~~/hearing officer. The ~~City Commission~~/hearing officer's decision shall be promptly reviewed by the court.

(e) Requirement of exhaustion procedures. Judicial review of a suspension or revocation, or related hearing or appeal proceedings, shall be available only after the administrative procedures and remedies set forth in this Section have been exhausted.

(f) Notice of final suspension or revocation. If no response or request for a suspension or revocation hearing is filed within 15 days of the notice of a pending suspension or revocation, or if the licensee who requested the hearing does not appear at the suspension or revocation hearing after notice, or if the ~~City Commission~~/hearing officer decides after a hearing that a pending suspension or revocation will become final, then the City Manager or his/her designee shall issue to the licensee notice of final suspension or revocation of the adult entertainment license and mail or arrange delivery of the notice to the licensee's record address.

(g) Effective date of suspension or revocation. The suspension or revocation of a license shall take effect the day after delivery of a notice of final suspension or revocation to the licensee in person, by posting on the licensed establishment, or by mail to the licensee's record address, or on the date the licensee surrenders the license, whichever happens first. The licensee shall immediately return and surrender a revoked license to

the City Manager or his/her designee or surrender the revoked license, upon demand, to a member of the Police Department.

SECTION 4. CODIFICATION. It is the intention of the City Commission of the City of Casselberry, Florida, and it is hereby ordained that the provisions of this Ordinance shall become and be made a part of the Code of Ordinances of the City of Casselberry, Florida; that the Sections of this Ordinance may be renumbered or relettered to accomplish such intention; that the word, "ordinance," may be changed to "section," "article," or other appropriate word.

SECTION 5. CONFLICTS. All Ordinances or parts of Ordinances in conflict with any of the provisions of this ordinance are hereby repealed.

SECTION 6. SEVERABILITY. If any Section or portion of a Section of this Ordinance proves to be invalid, unlawful or unconstitutional, it shall not be held to invalidate or impair the validity, force or effect of any other section, subsection or portion of a Section of this Ordinance.

SECTION 7. EFFECTIVE DATE. This Ordinance shall become effective immediately upon its passage and adoption.

FIRST READING this 24th day of February, 2003.

SECOND AND FINAL READING this 24th day of March, 2003.

ATTEST:

/s/ Thelma McPherson
Thelma McPherson,
City Clerk

/s/ Bruce A. Pronovost
Bruce A. Pronovost,
Mayor/Commissioner